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Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 593)

136
795431
Sup. Ct.

Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

/PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

[CONTINUED ON SECOND PAGE OF COVER]

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 2, 1947.

SUPREME COURT OF THE UNITED STATES

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No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

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United States District Court

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Petitioner,

vs.

PARAMOUNT PICTURES, INC., et al.,
Defendants.

Equity
No. 87-273

Before:

HON. AUGUSTUS N. HAND, C.J.,
HON. HENRY W. GODDARD, D.J., and
HON. JOHN BRIGHT, D.J.,
Constituting a Statutory Court.

New York, October 8, 1945, 10:30 a.m.

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(2)

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(2-A)

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George A. Raftery, Esq., of Counsel.

FITZELSON & MAYERS, ESQs.,
Attorneys for American Civil Liberties Union;
Harold J. Sherman, Esq., of Counsel.

(3)

Mr. Wright: If the Court please, do you wish us to proceed with the opening statement? I had understood there was a motion. I did not know whether that was to be disposed of first.

Mr. Proskauer: Mr. Wright, we cannot hear a word you say. It may be important at some stage of the case to hear you clearly.

Mr. Sherman: If your Honors please, and with Mr. Wright's permission, I represent the American Civil Liberties Union. On its behalf, I ask for an order granting leave to

intervene in this case for the purpose of presenting argument and the filing of briefs as *amici curiae* at a time to be fixed by this court following the close of the evidence in the trial herein.

The pivotal issues of this case relate to an extraordinary medium of theatrical art and communications in the form of motion pictures. They are, therefore, of paramount sociological importance and vitally affect the constitutional rights and interests of the general public. Accordingly, I respectfully submit that the American Civil Liberties Union, as representative of the general public, should be granted an opportunity to be heard on the merits.

Mr. Robert L. Wright of the Department of Justice has already indicated his consent to the granting of this motion.

(4)

Mr. Davis: If the Court please, I was waiting to hear whether the Government had anything to say on this motion. If it has not, on behalf of the defendants and all the defendants, we object to any such intervention. We take for granted, and we think we may safely take for granted, that the public interest is adequately represented by the Department of Justice.

With great respect to the Civil Liberties Union, which I understand is a body of worthy gentlemen; whose intent is to protect the constitutional rights of those who have no other advocate, I suggest to the Civil Liberties Union that they had better devote their energies to their main purpose instead of standing forward as a substitute or auxiliary in a Government suit such as this.

Judge Hand: We will reserve decision on this motion.

Mr. Caskey: On behalf of Twentieth Century-Fox Film Corporation and National Theatres Corporation, we wish to file a preliminary brief, in answer to the brief which the Government submitted on September 20th. I ask leave to hand it up.

Judge Hand: All right.

Mr. Seymour: I also have a short preliminary memorandum on behalf of the Paramount defendants which has been

handed to the Government, and I would like to file it.

(5)

Judge Hand: All right. Mr. Wright.

THE GOVERNMENT'S OPENING.

Mr. Wright: If the Court please, this suit is the twelfth in a series of fifteen cases brought by the United States against the major motion picture companies, charging them with violations of the antitrust laws. All of these suits were filed during the period from 1928 through 1939. This was filed in 1938.

It charges that five integrated groups of corporations engaged in production, distribution and exhibition of films, exercise arbitrary control over the entire industry through agreements with each other and with the other major distributors, and that each of these producer-distributor-exhibitor combinations is illegal in and of itself.

The other Federal suits that were filed before and after this one dealt with specific film distribution abuses practiced on a national scale, or with local exhibitors in particular localities.

This suit is the first and only one of the series which attacked the legality of the basic nation-wide control over the production, distribution and exhibition of films which the five principal film distributors enjoy through their ownership of the five largest theatre circuits in the country.

The determination of the issue of the legality of that

(6)

control was postponed in 1940 when these five theatre owning distributors, known in the trade as Fox, Loew, Paramount, R.K.O. and Warner, respectively, consented to the entry of a decree against them in this case which went into effect for a three-year trial period. That decree set up a nationwide arbitration system to handle trade practice complaints brought by small exhibitors. It left these defendants in control of their theatres, with the proviso that they should

not engage in a general program of expanding their theatre holdings during this period, and that the Government would not press its demand for the dissolution of these integrated units during the same period.

At the end of the three-year period the defendants' control—

Judge Hand: What do you mean by the integrated units?

Mr. Wright: The five companies, combinations referred to in the complaint as producer-exhibitors—Fox, Loew, Paramount, R.K.O. and Warner.

At the end of this period the defendants' control over all three phases of the business remained substantially untouched by the relief granted in the consent decree. There were prolonged negotiations for a new decree, which broke down over this theatre divorcement issue, and that issue is now again before the court for disposition, together with (7)

the issue as to what injunctive provisions are necessary to give relief against such specific practices by or of the distributor defendants—that is, including Columbia, United Artists and Universal, which do not own theatres—such practices as the court may find to be illegal.

The amended complaint filed in 1940 and the trial brief filed by us last month, I think sufficiently describe the practices that are brought into question, and the existing combinations that are alleged to be illegal per se, and the general theory of the plaintiff's case.

All that I shall attempt to do here is to outline the proof that plaintiff will offer and the general plan of procedure that will follow in offering it.

Now first, let me say that the plan tentatively announced last June at the pre-trial hearing, of presenting the Government's case in documentary form, will be followed. We shall not call any complaining witnesses as part of our prima facie case, although it may be necessary in some instances to call a witness to identify and describe certain tabulated material if its authenticity is disputed by the defendants. How-

ever, the major part of our case will consist of documents prepared by the defendants themselves for the purpose of this case, or documents kept in their files in the ordinary course of their business; and, of course, as to those docu-

(8)

ments the only question for the court as to admissibility is relevancy and materiality.

This method of presentation has been made possible by very comprehensive use of discovery procedure, supplemented by information voluntarily supplied by the defendants and their counsel. As the court was previously advised by letter, we supplied counsel for the defendants on September 1st with a list of identified documents on which we would rely. I believe the court already has mimeographed copies of that list which were furnished at that time; and I should like to now submit a printed copy, which is a copy of the mimeographed list with some supplementary material added, and which also has—

Judge Hand: Haven't we got those?

Mr. Wright: You had that before in mimeographed form only.

Judge Hand: I see.

Mr. Wright: This contains in addition to what was in the mimeographed copy a table of contents at the beginning, and also an index at the end; and then beginning at page 111 we added a supplemental list of data which was identified after the September 1st list was served, and that supplemental list of documents appears at pages 111 through 116, and the index is found at page 117, at the end.

Now you will note that that list carries a detailed description of each identified document opposite the exhibit number for identification listed largely in numerical order.

However, I think the table of contents and the index alone are sufficient to indicate the general character of this documentary proof and its general relevance to the issues that are raised.

We shall offer first the interrogatory answers of the defendants which were filed in 1939, as supplemented by further answers and admissions of fact filed in 1946. The 1939 answers give a detailed account of the corporate structure of the defendants, their principal stockholders and creditors, and the corporations in which they own stock interests; and answers of this type are grouped generally under the heading "Organisation" in this list of exhibits. They also contain data as to the corporate history of each of these defendants, which is listed in the interrogatory answers and in this list under the general heading "History."

At that time they also supplied data on their production activities designed to show the extent to which production talent of various kinds and equipment was interchanged among the defendants, and the extent and character of the physical production facilities that were possessed by each. Those are contained in answers grouped under the general heading "Production."

Then under the heading "Distribution" each defendant (10)

supplied data as to each feature picture released by it during the 1936-1937 season, which was the last full motion picture season preceding the filing of the suit. That data shows the national gross film rental received for each feature released and the total number of domestic exhibitions for each feature.

The individual film rentals paid for these features by all of the theatres in selected cities—New York, Philadelphia, Kansas City and Atlanta—is also found in these answers, together with the actual dates that the pictures played. Those four cities were selected to give a variety of so-called metropolitan areas from the standpoint of both size and location, and to cover areas of which one or more of the major distributors have held a dominant theatre owning position.

Thus, in New York, the prior run theatres are principally controlled by R.K.O. and Loew. In Philadelphia they are controlled by Warner; in Kansas City by Fox; in Atlanta

by Paramount. So that the four cities cover the activities of the five producer-exhibitor groups.

These answers also contain a detailed statement of the names and locations and seating capacities of all the theatres in which each of the defendants had a financial interest, and those in which they had pooled interests with other defendants or outsiders.

(11)

In the four cities just referred to, information was also furnished as to the particular runs—that is, the playing positions—of the affiliated theatres in those areas. By “affiliated theatres” I mean those in which one or more of the producer-exhibitor defendants had a financial interest.

And the data in those interrogatories also shows the extent to which the pictures of each other and of the other distributors were used in these theatres, together with data as to the admission prices charged, the program policies, and the clearance provisions which were applicable to those theatres.

The principal purpose of that detailed information in those four cities was to show the pattern of feature film distribution in metropolitan centers where the defendants operate theatres; in full detail.

I have some charts here which give a better picture of the kind of information that is contained in those detailed answers than I can supply orally; and if the court will take time to examine them, I think an understanding of this data will be helpful.

Mr. Proskauer: May we inquire what is being tendered to the court?

Mr. Wright: There are copies which will be given each of you.

(11-A)

I think you have before you a chart headed, “The Record of Exhibition of Warner Brothers-The Singing Marine” in Philadelphia, Pennsylvania. That is a chart which was prepared from data in these interrogatory answers, which is in-

tended to give a picture of the manner in which films are played off in a metropolitan area of that kind.

(12)

On this chart, for the purpose of locating the various theatres, you can see that the city has been divided into nine areas, which are shown on the map at the bottom of the fourth column, and it has a letter designation for each area, beginning with South Philadelphia in the first column, then downtown, which I think in Philadelphia is referred to as the central city, and then the various suburban areas in the town.

We have attempted to show the approximate size of the theatres involved by the length of the bar which bears the theatre's name. The depth of the bar indicates the period of time during which the picture was played, and you will see the dates in the lefthand column show the time of the year; and each weekly interval is broken by these double lines, which indicate Saturdays and Sundays. Those days have a special significance in this business because they are the preferred days of the week and exhibition on those days generally means as much in terms of gross revenue as the rest of the week together.

Down in the lefthand corner of these blocks you will find the film rental paid by the theatre and in the righthand corner the evening adult admission price appears. The shading on the blocks indicates affiliation or non-affiliation, that is, those which are shaded are all theatres of Warner and those which are unshaded are the theatres of independent

(13)

opposition.

This pattern of distribution in the town, that is shown for this one picture here, is fairly characteristic of the exhibition of all pictures in that normally you have an exclusive first-run in the area in a downtown theatre, such as you have here of the Fox, for a substantial period of time, usually a week or more, and then the continuation of the exhibition, perhaps, in another theatre in what is termed a

move-over or continued first-run. Then when the film, after an interval of usually three weeks from the conclusion of the first-run in Philadelphia, moves into the neighborhood theatres, you find the so-called key theatres in each of the neighborhoods playing the film simultaneously. And then it moves on into the remaining theatres in the neighborhood, usually with an interval elapsing between each of the ensuing runs.

Of course, these intervals that appear on here are not haphazard. Those are fixed by the clearance provisions in the licenses which the distributor makes with the owner of the prior run theatres.

The admission prices, of course, are also regulated to the extent that a minimum is usually provided in the license agreement. Of course, the film rental that any of these theatres can pay is dependent on the length of time that the picture plays, and the seating capacity, and the admission (14)

price charged by the theatre, and you will note from the chart that the admission price is very generally a function of the playing position, that is, the first-run house that has the earliest exclusive run charges the highest price, and the prices decrease as the freshness of the film decreases.

And you will note from this that, in terms of film rental, the first-run pays many times what the next succeeding runs pay and that, under this system of distribution, your total film rental that comes out of the area—total film revenue—is largely concentrated in the early runs of the film.

Judge Hand: Is this film something produced by Warner or by any of the people?

Mr. Wright: This film happens to be one that was produced by Warner, that is to say, "The Singing Marine," and, of course, in the case of a Warner film, you will have a higher concentration of film revenue in the Warner theatres than you would in the case of any other distributors, but the general pattern remains the same.

For the purpose of comparison, I have another chart here of the RKO film of "Shall We Dance?" which was also a gen-

erally high-grossing picture, and you can see that there are differences in the particular theatres which play, although substantially the same general pattern of prior run exhibition (15)

in the Warner houses is maintained. You have your downtown first-run there in the Stanley; then what is known as a move-over or continuation of the run in the Carlton; and then it moves into the Earl for another five or six days; and then goes out into the neighborhood first-runs which play the film——

Judge Hand: This "Shall We Dance?" starts in a Warner theatre?

Mr. Wright: Yes. Again, all of the shaded theatres there are Warner theatres, and the white, the unshaded, theatres are independent. And you will note the same general pattern occurs, in that your admission prices constantly become less, the playing time in the particular theatre, that is the length of the run, becomes less and, of course, the film rentals also become less. So that you have a similar concentration of revenue in your early runs, and again those intervals of runs are fixed by the clearance and run provisions of the license agreements which the exhibitor, in this case RKO, made with Warner as a theatre operator.

We have a number of these charts but none of them is really evidentiary material; that is, the evidence is really contained in the interrogatory and will be tabulated, but I merely offer these for purposes of illustration.

There is one other, I think, for Philadelphia that might be of interest to the Court, which shows what happens to 16

a film which is not a first class box office attraction, that is, a low-grossing film.

I remember in the argument of the Goldman case, one of the judges wanted to know what happened to a film in Philadelphia that did not get a first-run in one of the downtown theatres. Well, the answer given was that it always gets a first-run somewhere, which is true, but this shows

that where your film gets its first run, not in a downtown house, but in the neighborhood, such as here, of course, the possibilities of realizing film rental almost vanish. For example, this particular film, which was a low-grossing film nationally, not a good box office attraction, found its first run in this neighborhood house, which paid a rental of \$250 as compared with the five or six or eight thousand dollars paid by those first runs in the downtown houses.

And then, of course, it did not have the benefit of the first-run clearance that your downtown houses have and simply went into the remaining neighborhood theatres at extremely low rentals, so that the performance in town was comparatively negligible in terms of box office return and film rental return to the distributor, which in this case happened to be Universal.

These contrasting charts merely illustrate the importance of first-run playing time in the downtown first-run (17)

theatres. You see, those downtown theatres play films for periods of anywhere from a week to five or six weeks, with the result that they use a comparatively small number of films each year and there are always more films available for exhibition than there is available playing time in your downtown first-run houses, with the result that a selection has to be made by the first-run exhibitor as to which films get into the downtown houses and which are sloughed off into the neighborhood theatre, such as this one does.

Of course, the effect of this system of release is to make the position of the first-run exhibitor in an area of this kind of extreme importance in determining the success or failure of the films that come into the town.

Mr. Proskauer: Would your Honors permit me to ask Mr. Wright to speak louder so that we may hear him a little better? We have, really, very great difficulty in following him.

Judge Hand: Yes, speak louder.

Mr. Wright: I will do the best I can. Perhaps if I face this way a bit it might help.

Mr. Caskey: Thank you.

Mr. Wright: This same pattern that is illustrated by those charts generally prevails down through smaller communities, the main difference being that you do not, of course, have as many theatres and you do not have as (18)

many simultaneous runs in your neighborhood houses, but you still have your first-run downtown and then a second or third. In the case of Kansas City, one of the other towns studied, I believe both the second and third-runs are exclusive.

We have a chart for Kansas City here which will show the essential difference.

Judge Hand: Mr. Wright, who suffers if one of these films does not get into the downtown theatre?

Mr. Wright: Why, I don't suppose anyone suffers but—principally—but the distributor. In the most cases, they are films which are not as good, not as generally attractive to the public, although, of course, there is no way we can evaluate. In this case we cannot attempt any evaluation of these films in any other terms than what they actually produce at the box office. There are no standards, I think, by which any of us can judge them accurately esthetically and, of course, what they do at the box office is inextricably wound up with what happens to them in these situations.

Judge Hand: The person that would suffer in these Philadelphia cases would be Warner, if the film, did not get a good run, I mean in a downtown theatre?

Mr. Wright: No, Warner, of course, is in a position to take care of its own films very nicely by control of the downtown in the first two or three runs in the town. I don't (19)

think that Warner has any problem in Philadelphia. The distributor who faces the difficulty there is principally the

distributor who has no theatre interests of his own, is in no position to exchange reciprocal advantages with Warner.

Judge Hand: If he wants to put some other film on of his own.

Mr. Wright: I think perhaps your Honor may be confusing the terms distributor and exhibitor. The distributor is the party who rents the film for exhibition; the exhibitor is the person who operates the theatres and pays the distributor the film rental.

Of course, as far as Philadelphia is concerned, Warner is in the dual position of exhibitor, which controls the prior-run theatres, and a distributor which, of course, distributes many first-run films.

Judge Hand: That is what puzzled me.

Mr. Wright: Well, that is a characteristic situation in the great majority of the metropolitan centers of the country, that is, one or more of these producer-exhibitor combinations does have operating control of the prior-run theatres and, of course, also distributes films in the area as a distributor and, of course, the essentially monopolistic character of the arrangement, in so far as the distributors are concerned, that is, your non-theatre-owning distributors, is the arbitrary ability that that situation gives to the producer-exhibitors (20)

to exclude the films of the non-theatre-owning distributor, to favor the films of each in so far as—

Judge Hand: That is the injury or the principal injury or one of the principal injuries that you are talking about—

Mr. Wright: Yes.

Judge Hand:—that the independent cannot get in his film?

Mr. Wright: Well, he gets it in only to the extent that he is able to make an adjustment with his producer-exhibitor competitor and if he lets him in, to the extent that he lets him in, he has a right; if he chooses to exclude him, he is out.

That is, of course, only one aspect of the kind of exclusion that we are dealing with. In so far as the independent exhibitor in the town is concerned, his playing position of his theatre, that is, the kind of theatre he can determine, or kind of theatre he can operate, is, in large part, a product of the agreements that the distributors make with him—in Philadelphia, Warner, for example, that is a producer-exhibitor, operating theatres there—because his playing position is dependent upon such clearance and other run terms as any distributor makes in his agreements with Warner as a theatre operator. And he finds himself frequently excluded, (21)

as these charts indicate, from the prior, earlier runs which are the lucrative part of the exhibition business as well as the most lucrative part of the distribution end.

There is another aspect of the producer-exhibitor's control over the independent theatre operator situation, which we have emphasized in the brief there, and that is the fact that his admission prices are also controlled by the agreements that are made by him with the distributor whose films he licenses and also by the agreements which the same distributor makes with Warner because, in fixing his playing time, if he has to play, let us say, seven days or fourteen days behind a Warner house, which is charging 25 cents or 30 cents, that, if course, puts an automatic ceiling on the price he can charge because he cannot get more and probably not as much for a later exhibition of the film in the same area as Warner has gotten for the prior exhibition. So, the maximum price restriction in his contract, simply virtually puts him at a fixed admission price level, and your whole price structure, your admission price structure, in any particular area is, of course, closely geared to the run and clearance structure which, in turn, is determined by your license agreements between all the distributors and the operators of the prior-run theatres.

As I say, the pattern, of course, varies from city to city

(22)

but I think you will see that on this—you have there the record of exhibition of "Road to Glory" of Twentieth Century-Fox in Kansas City?—you will note there, of course, you have your long first-run downtown of a week or more, then you have a considerably greater interval before the second-run. In that case there is, I believe, a 39-day lapse between the time it went into the Plaza for a second-run and then to the Appollo for a third-run, and then, about four weeks later, the film went into the independent houses.

Again, generally speaking, as the size of the town decreases the length of the clearance of the first-run over the succeeding runs tends to increase and that is illustrated by what happens at Atlanta.

That is a chart of two pictures that were placed on one chart. There is no attempt there to divide the town into areas. You will note that the chart, on the right, is one of a popular picture which had its first run for a week in the Grand Theatre, an affiliated theatre there, paying a rental of \$3000-odd and then, on the second-run, an independent house paid film rental of \$75 and there was an interval of clearance there between the first and second run of a little more than 60 days.

Judge Bright: That \$3190 is a fixed rental or percentage?

Mr. Wright: Generally a percentage. That figure is (23)

obviously one which was determined on a percentage basis, and the majority of your first-run film rentals will be computed that way.

And in the Atlanta situation the only affiliated houses are the first-run theatres there, that is, they control no other runs, but in terms of what comes out of the town, even though they have only one run, the first run in that town, the tabulations of the figures for all the theatres and all the features show that they still took out of Atlanta about 70 per cent of the total film rental that came out of the town—came out of the first-run theatres which were in affiliated hands. Generally speaking, you get about the same figure for all these towns in which the producer-exhibitor defendants

operate theatres. The same would be true of Philadelphia, Kansas City and New York, somewhere between 65 and 70 per cent of the total rental coming out of the area will go through the affiliated houses.

Of course, in each case the control of that much rental, the larger the city the more of the earlier runs that you have to control in the form of theatre operations but, as is shown here, even a city as large as Atlanta, it is possible to control 70 per cent of the film rental in the town simply by the operation of the first-run theatres alone.

True, of course, the use of your clearance provisions is (24)

as shown. In this case you have a 60-day clearance before any of the independent theatres in town can show the film. The result is there is very little value in the films when they get them.

As I say, we obtained in the '39 interrogatories very elaborate data of this character covering all the runs of the particular features in these five selected cities, but on the basis of that experience we found that you could account for the great majority of the film rental in these towns by merely either first-run, in the case of smaller towns, or first and second in slightly larger ones, or perhaps the first five in the large centers, such as New York. So that in securing additional information this year, in preparation for the trial of the case, we sought to cover the last motion picture season preceding the trial, which was the 1943-1944 season. I don't know whether I mentioned it, but a motion picture season ordinarily begins at September 1 and lasts for a year. In covering that season for the trial, we served additional interrogatories, in which we attempted to cover all the cities over 25,000 population. We got four selected features, one from each of these distributors, the first-run rentals in all towns over that size, then in cities over 50,000, the first and second runs; in cities over 200,000, the first, second and third runs; and in Chicago, Philadelphia, Detroit and Los (25)

Angeles and in each of the five boroughs of New York City,

we picked up the first five, or the first four runs.

Then, instead of using a city by city comparison, we got the national gross rentals for each of these pictures for the 1943-1944 seasons broken down by exchange areas. There are about 31 or 32 of those in the country for each distributor. So that we were able to make comparisons between the total revenue that came out of the prior runs in these cities of more than 25,000 with the total revenue and the total number of exhibitions in the areas in question.

Now, of course, we are able to make comparisons as to the first-runs with the 1936-1937 data, and I think the results may be generalized by saying that at least as much of a concentration of revenue in prior affiliated runs occurred then as before the suit was filed, if not more. For example, if you chart these early runs for which we got data on the 1943-1944 season, here is what the Warner picture for that season in Philadelphia looks like.

(26)

This trial is limited to the first four runs, because that was all the data we got in the 1943-1944 answers, but you can see by running the film at the Mastbaum, which appears to be misspelled on there—it is spelled with one "u" in it—for a period of almost six weeks, a very large theatre which had formerly been closed but was reopened, a \$35,000 film rental was realized, which was about thirty times as much as it got in any of those succeeding neighborhood runs, which are, of course, much the same as they were during the prior season.

For comparative purposes we made a 1943-1944 chart of Kansas City and Atlanta. I believe you have there the record of exhibition of a picture released by Loew's, "As Thousands Cheer", in Kansas City. In that case, in the Kansas City chart, on Loew's, you will note—

Mr. Caskey: Just wait a minute. Mr. Wright. We don't see, to be furnished with what you are talking about.

Mr. Wright: I think you are one chart behind.

Judge Hand: You said Loew's Kansas City, didn't you?

Mr. Wright: Yes, "Record of Exhibition of Loew's 'As Thousands Cheer', Kansas City, Missouri."

Judge Bright: You may have one in Philadelphia and one in Kansas City.

Mr. Wright: I am sorry our number system seems to have gone wrong. But you have there the "Record of Loew's 'As Thousands Cheer' in Atlanta, Georgia"?

Judge Bright: Yes.

Mr. Caskey: No.

Judge Bright: And in Philadelphia.

Mr. Wright: The Philadelphia chart shows I think substantially the same pattern as the chart for the Warner picture there. You have a long first-run in the Stanley with about \$35,000 rental, in this case ten or twelve times as much as what was paid by the neighborhood runs, and in this case you have a first-run in Germantown by an independent theatre, the Erlanger, playing simultaneously or what is called day and day with the Warner Brothers Orpheum Theatre, but otherwise substantially the same pattern as in the case of the Warner picture.

And I think you also have there the same picture, Loew's "As Thousands Cheer," in Atlanta. There you will note again that it has its first-run in an affiliated house for more than a week, then a move-over at what is called the Grove Theatre there, and after a lapse of about sixty days goes into a second-run at the Independent Plaza, and at the affiliated Gordon again with your first and move-over run rental totaling about a thousand dollars, and your second-run paying \$425 and \$280—I should not have said a thousand; I should have said \$10,000 for the first-run and move-over, and a (28)

total of about \$700 for your second-run.

Of course, we again obtained for the 1943-1944 season total revenues of each of the things that the distributor defendants released during that season, and for comparative purposes we set up in a table called Appendix A of the trial

brief at page 35—you have our trial brief there, by the way?

Judge Hand: Yes.

Mr. Wright: If you will turn to page 35, if the court please, you will see a tabulation at the bottom of the page for the 1936-1937 season which gives the various numbers of features released by the defendants classified in accordance with total gross returns from all domestic theatres, and you will notice there that for the most part less than fifty per cent grossed more than \$500,000.

Now if you will turn over to page 36, at the top of the page is a similar tabulation for the 1943-1944 season, in which you will see that the total number of features released by most of the defendants is substantially less, but the number in the higher grossing brackets substantially increased, so that the net result of the change during the period was that you had an even greater concentration of revenue in relatively few features than you had before, although even in the 1936-1937 season it was true that perhaps half of (29)

the total film rental you get from all your features would come from less than twenty-five per cent, those in the higher grossing bracket.

So the effect of your whole system of release is one which tends to concentrate film rental in a relatively small number of features, and again to concentrate the returns in your prior runs in metropolitan communities. These selected cities, for example, New York, I think contributed 12 or 13 per cent of the total revenue that came out of the United States—considerably more, of course, than its population proportion would suggest; and the same thing is true of Philadelphia and down the line.

Judge Hand: Now, in Philadelphia, does Warner own these downtown theatres, as you call them?

Mr. Wright: Yes, own or lease. That is, they operate them.

Judge Hand: Yes?

Mr. Wright: Yes, with the exception of, I think you will find, the Arcadia on one chart, a downtown theatre which is in independent hands, but which plays on a second-run basis.

Judge Hand: In that way they determine what films may be shown at them?

Mr. Wright: Yes. They, of course, control the program policy of the theatres.

(30)

Judge Hand: Whether they are their own or somebody else's?

Mr. Wright: That is right, your Honor. Now, in order to demonstrate the stability of the prior run preference that the defendants exchange among themselves in the metropolitan theatres—in the metropolitan centers where they operate theatres, we obtained additional data in 1945 in the form of admissions of fact which show the first-run distribution of the theatres released by all of the defendant distributors during four selected seasons in the 92 cities with populations of more than 100,000. The seasons selected were the 1936-1937 season, which was the last full season before the suit was filed; the 1939-1940 season, which was the last full season before the decree was entered; the 1941-1942 season, which was the first season in which the new method of selling provided by the decree was used—that is, in that season sales in small blocks were used instead of in season groups as in prior years; and the 1943-1944 season, which is the last one before the trial.

Now the information that is contained in those admissions has been summarized at pages 17 to 19 of the trial brief. You will find that in tabular form. That is the brief itself, not the appendix.

Now that table of tabular material which you see at pages (31)

17, 18 and 19, I do not think is quite adequately explained in the brief itself. The cities in the left-hand column are the 73 cities which we claim in our complaint were those in which the defendants had theatre operating monopolies and are

listed in the descending order of size. The names at the head of the column will be each of the defendants as a distributor. That is, in the column opposite "Chicago," for example, the Warner films had their first-run in Paramount Theatres; the Fox films in the first-run theatres of Paramount; Paramount in Paramount; Loew in Paramount; RKO in RKO; United Artists in Paramount; Universal in RKO; Columbia in Paramount, and so forth. The footnotes are also misplaced in that column. The number 6 should be up above where it is after the words "Fox & Independent." Where we have the symbol "&" it means that first-run pictures were split. Then the footnote 7 should be one space above where it is, and where we have a dash it indicates that the first-run theatres were pooled between the exhibitors named. That is, they are operated under a common management arrangement.

Judge Bright: Well, what is a first-run theatre?

Mr. Wright: What is a first-run theatre, of course, is determined as a matter of agreement by the licensing agreements that are made with it, by the distributors' pictures (32)

which it shows. That is, the agreement between the operator—

Judge Bright: Does the distributor determine which is the first-run theatre?

Mr. Wright: For his particular pictures, yes, he makes of course agreements with whatever exhibitor he deals with to show his pictures first-run in the town.

Judge Bright: Does some higher authority than the distributor determine which is first-run?

Mr. Wright: Nobody does it alone. It is only done by agreement between the distributor and the operator of the theatre that is used as his first-run outlet. That is, the thing that gives the theatre a first-run status is, of course, an express agreement between the theatre owner and the distributor that the exhibitor in that area will have the first and exclusive showing of the picture in that particular area, with a specified clearance over the subsequent exhibition of the

film in other theatres in the area. That, of course, is always a matter of express agreement between the distributor licensing the film and the first-run theatre operator.

Judge Bright: Is there anybody over the distributor who determines which are the first-run theatres?

Mr. Wright: Well, if you mean any administrative or (33)

other trade authority, no. They are determined by agreement between the distributor and the first-run theatre operator.

Now of course under your system of distribution here, the status of your theatre as a first, second, subsequent run, is a function of the agreements that are made between the distributors whose pictures are played there and the owner or the operator of the theatre, in every case. And your first-run exhibitor, however, exercises a substantial control over the other operators in the town because the agreement he makes with the distributors, which gives his first-run status, also controls the terms under which the picture is going to be made available to subsequent run competitors.

As I say, we obtained this data of first-run distribution which is reflected in these tables for the 1943-1944 season for four seasons covering that period from 1936-1937 through 1943-1944, and it will appear from an examination of that data that there was a considerable degree of stability in this first-run distribution pattern. There were some changes during the period but not very many, and the net effect of the bringing of the suit, of course, and the decree did to some extent loosen the control of the major producers as demonstrated by that pattern, but it left it essentially and substantially the same in 1943-1944 as it was in 1936-1937.

(34)

Now we think the interrogatory answers and the admissions of fact that are described, give a very comprehensive picture of the extent of the actual control of the domestic film market exercised by the first producer-exhibitor defendants. That, however, is of course only a part of o case,

which is concerned with the quality of that control as well as its quantity.

Now in order to show the quality or character of the control, we shall offer the various forms of agreement under which and by which it is maintained. Of course of primary importance are the printed forms of license under which the films of all the defendant distributors are generally made available for exhibition in theatres. Those are the agreements which fix the terms I have just discussed with your Honors.

Now we have printed a set of those sample forms in this Appendix B. We took the feature form that each distributor used for the 1935-1937 season and printed it in full. The principal reason for doing that is that they cannot be read otherwise. These agreements are one-page agreements in which the back page is covered with type much finer than you will find in the ordinary insurance policy. It takes about 25 of these pages to print one of those.

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Now we took one form for each distributor for that 1936-1937, and printed it in full here; and then we also took a sample form for the 1943-1944 season, and instead of printing it in full just printed a summary indicating changes, if any, from the former 1936-1937 agreement; and then we also added in this appendix, in addition to the table of contents, a schedule of similar provisions showing where they will be found in the appendix.

Now we have provided an analysis of those forms at pages 9 to 12 of the trial brief, and I am not going to attempt to repeat that analysis here, except to point out that there have not been any substantial changes in the basic provisions of these forms concerning run, clearance and minimum admission price-fixing during this period, and, of course, those are the provisions by which the extensive control of film revenue that I have just been referring to, and illustrated in these charts, is maintained.

We will also supplement these general forms of agreement with specific examples of executed agreements under which the defendants, distributors, have licensed their films in the so called affiliated or producer-exhibitors' theatres. Some of these have been summarized in Appendix A of the trial brief, but we shall offer additional agreements covering similar situations for both the 1936-1937 and 1943-1944 seasons, so (36)

that the court will have a basis for determining or for comparing agreements of that character for those two seasons.


In general, we believe that a comparison will show that their courser has been a tendency on the part of the defendants since the filing of this suit, to be somewhat less explicit in the later agreements as to the minimum admission price fixing and in the clearance restrictions, but essentially they are similar to the earlier agreements and contain the same profit-sharing features and privileges which tend to give each of these defendants vested interests in promoting the business of these affiliated theatres as against independent opposition.

Now the extent of what we call cross-licensing among these defendants is, we think, well covered by the admissions of fact, and the only purpose of these representative agreements is to indicate the general character of the agreements by which the cross-licensing pattern is established and made effective.

We have also covered the extent of the use of express clearance and minimum admission price provisions in the licenses among the defendants in the answers we got to the 1945 interrogatories.

Interrogatory 6, for example, asked them to set forth such provisions which had been expressly incorporated in their (37)

license agreements that they made in all the towns of over 25,000 population for the 1943-1944 season. So it will be unnecessary, of course, to introduce the agreements themselves for that purpose. And interrogatory No. 48, I believe,



of the 1939 answers, gives similar clearance data in interrogatory form for the four selected cities of the 1936-1937 seasons for comparative purposes.

Now in addition to that license agreement material, we will also offer agreements now in effect or recently terminated between the defendants with respect to the operation of theatres owned by one and operated by another, under which there is generally a profit-sharing arrangement. In this case we expect to offer agreements in substantially all possible combinations of two or more producer-exhibitor defendants, whereby either one leases a theatre to another or else they operate all the theatres in a certain situation through a corporation in which they each own stock interest, or where they simply have an agreement where they pool the operating policies and profits of the theatres in a particular area.

Now we have also, of course, shown in the admissions of fact, the situations in which the films released by one or more of the defendants are split between the theatres operated by two or more upon an arbitrary basis, which amounts to a pooling of the product rather than a pooling of the (38)

theatre operations or pooling the profits. Of course agreements of that kind are not significant in themselves except as evidence of an intention of the producer-exhibitor defendants to operate upon a non-competitive basis vis-a-vis each other. Of course in any event, the profit-sharing provisions of their film licenses make competition between them for each others films without point.

Now the interrogatory answers and admissions of fact are largely limited to data as to the extent and character of these defendants' control in towns over 25,000 population. Of course they do operate in several hundred towns of smaller size; and in order to complete the picture of their control of theatre operations, we had the Federal Bureau of Investigation make a survey this summer of approximately five

hundred of these smaller towns in which the defendants operate theatres, primarily to determine in which of those towns they owned or operated all of the theatres, those in which they owned or operated all of the first-run theatres, and the number of theatres which were being kept closed in those towns.

This data, together with the additional information as to the general character of those theatres in the towns, and their program policies and admission prices was tabulated, and a separate form for each town made, and those forms (39)

were submitted by us to counsel for the respective defendants who operated in the town.

We have not yet been advised as to the extent to which the defendants are willing to concede the accuracy of this data. Some of them, I understand, are still engaged in checking it. But since all of these facts in this survey are of an objective nature, and about which there obviously cannot be any real dispute, we think any corrections in these reports that the defendants desire to make, can be made by stipulation, and the court can have the benefit of this survey without the necessity of calling as witnesses the agents who made them.

This data, we believe, will show that more than 300 of these towns where they operate, one defendant owns all or has an interest in all the theatres in the town; that in 70 or 80 more of them they had all of the first-run theatres, and that there were a substantial number of theatres at least owned by these defendants which were closed at the time of the survey and which had been kept closed for substantial periods of time. That data, of course, does not prove the existence of monopoly power by itself, but it does show the extent to which the power demonstrated by other proof has been used to achieve what are known as "closed situations." That is, theatre operating areas where there is no theatre (40)

operating competition of any kind. And it also shows the

extent to which that control has enabled them to maintain idle excess theatre capacity in those so-called closed towns.

We also have additional data as to prior periods as to closed theatres in the 1939 interrogatories, but, of course, this is the survey which furnishes the up-to-date material in that regard.

Now we expect to show through this data described, the interrogatory answers, the admissions of fact, the express agreements that the defendants made with each other and their general forms of licensing and this F.B.I. survey, that each of these defendants has violated the act, and that the five producer defendants are illegal price-fixing combinations in and of themselves.

However, we shall also bring to the court's attention additional data which we believe is primarily relevant on the issue of the form that relief from these violations should take. This is largely in the form of administrative and judicial decisions and public records. For the most part it simply records the past performance of the defendants themselves in various situations where the restraint of trade was charged and proven, and is reflected in administrative and judicial decisions and proceedings to which they themselves or their predecessors were party defendants or respondents.

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In the cases where the proceedings are officially reported, there is, of course, no occasion for us to offer the reports in evidence. However, in such matters as decisions of the arbitration of the appeal board, and the arbitrators' awards under the consent decree, which are matters of public record but are not officially published or kept as a part of the records of this court, we shall offer a record of these decisions in evidence to be sure that they are properly incorporated in the record that is before the court. As to these decisions of the appeal board, we shall offer all of those, even though we will call specific attention to only a part, as that body of decisions represents the official record of complaints made against the defendants since the suit was filed which have

been considered both by an arbitrator and by the board of review of the arbitrator's findings. In our view that is usually reliable data as to the general scope and character of the specific competitive problems which are continuously arising in the industry, and forms a concise and informative record of such problems for the use of this court, and relieves this court of the necessity of performing the detail fact finding functions that have already been performed by arbitrators and the board in considering such complaints.

We think the material that we shall offer concerning the past attempts made to control competitive abuses in the (42)

industry by various judicial, administrative procedure, while at the same time permitting the producer-defendants to retain joint control of it, will show that there are no adequate judicial means for permanently regulating the exercise of such control in the public interest.

Now, if it should be thought desirable merely to regulate that control instead of abolishing it, the decision to undertake a program of that kind is probably one for Congress rather than the courts. The only final judicial solution of this problem that is permissible under the Sherman Act is one which will create or attempt to create, an industry structure in which the forces of competition, rather than a system of administrative control, will be used to protect the public interest. The justification for the rather radical departure from the ordinary judicial procedure as represented by the arbitration system set up in the consent decree is that it was expressly given a temporary status and was placed under ultimate judicial control, so that it could be used as a means of aiding ultimate judicial solution of the problem.

Therefore we submit the arbitration experience to the court primarily as a guide to relief, although it does also show the existence and continuance of illegal practices by the defendants since the decree was entered.

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Now in conclusion I should like to say that we will do everything we can to speed judicial determination of this theatre divorcement issue. Since the last decree was entered there was an expansion of theatre holdings by Fox and Paramount in, I believe, about to the extent of five per cent, between eight and ten per cent of the holdings of each, and the situation has become particularly urgent again by reason of the relaxation of controls over new theatre construction which has resulted in renewed threats of expansion by affiliated circuits in areas where they now operate. We do not want to jeopardize an early decision on the merits by devoting the court's attention to a preliminary motion for an order prohibiting further theatre acquisitions by the defendants during the pendency of the trial. And if reasonably expeditious procedure can be followed here, I do not believe that will be necessary. We think the divorcement issue may be disposed of rapidly, as its determination depends, as we see it, simply on an estimate of the legal consequences of facts which are essentially beyond dispute, and that the applicable legal principles are well established.

It seems to us that whatever factual defense is offered will necessarily take the form of confession and avoidance, in which the defendants offer additional facts by way of explaining rather than rebutting the facts offered by us which,

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of course, have been largely furnished by them.

We, of course, appreciate the extent to which the defendants have cooperated with us in enabling us to make a documentary presentation of this case. We shall, of course, cooperate with them in return in any way that we can to relieve them of the necessity of calling witnesses to establish facts which nobody is interested in disputing in any event. A large part of the testimony that they will offer will probably be regarded by us as irrelevant and immaterial, but we do not propose to take up the time of the court with any extensive arguments over their admissibility, and it probably

ought to be in the record for purposes of final disposition in appeal, and we can, of course, protect our legal position simply by formal motion to strike, and that is the course that we shall probably follow. In short, we shall do everything that we can to expedite the presentation of the defendants' case as well as of our own in order to see that there can be a prompt disposition of this extremely vital issue.

Judge Hand: Judge Goddard suggests that you talked about the five defendants here. What about the others?

Mr. Wright: You mean the non-theatre owning defendants? I do not think we have neglected them entirely. In our brief you will find we have summarized agreements that (45)

they have made. They are parties here, as we point out in the brief, not because we regard them as integral parts of any of these five combinations but because they have made illegal agreements with those five principal defendants which have the effect of discriminating against independent theatre operators, and that is why they are in the case.

Mr. Seymour: Do your Honors want to proceed now with the defendants' openings, or do you want to recess?

Judge Hand: I should think we had better proceed with the plaintiff's case.

Mr. Proskauer: Your Honor, it is the unanimous feeling of counsel for the defense here that if we could open now, it would make very much clearer to your Honors what the issues are really to be and would greatly facilitate you in passing on the plaintiff's case.

Judge Hand: All right, go ahead, Mr. Seymour.

DEFENDANT PARAMOUNT'S OPENING.

Mr. Seymour: If your Honors please, because the Paramount defendants are named first, I am going to make the first opening on behalf of defendants, and because so much of the Government's case is torn from its context—they point

to charts and figures but they do not tell you anything about the industry or these practices, or how they grew up, or (46).

how these defendants became owners of theatres—that it seems to us essential to supply that context. It is true that many of these facts are undisputed. It is also true that all the inferences are disputed, and so as the first counsel to open I must give your Honors some detail of the industry, and I hope you will be patient with me if I take a little longer. My distinguished colleagues won't take as long, and therefore you can look forward to hearing them.

This is the trial of certain issues in this case reserved by the Government in the Consent Decree signed by Judge Goddard in 1940 after extensive negotiation between the defendants and the Department of Justice and full hearing before the Court. By that decree the Government agreed not to institute proceedings for divorcement of the theatre interests of the five defendants who were parties to the decree until three years after the entry of the decree. That period expired in 1943, and the present proceedings are brought to try the issues and to procure such divorcement. It is useful to note, however, that certain of the provisions of the decree are still in effect. One of the practices in the industry originally complained of was the granting of clearance between theatres. Clearance is defined in the decree (footnote 1, Sec. VIII) as "the period of time, fixed by agreement (47)

between a distributor and an exhibitor, prior to the expiration of which a feature licensed for prior exhibition in a theatre may not be exhibited in another theatre or theatres." At this time the Government apparently still questions some aspects of that practice. You will note that there was a good deal of reference to clearance in Mr. Wright's opening, and many of these charts are constructed with reference to periods of clearance. Yet in the Consent Decree it was expressly recognized that clearance was essential in the business of distributing and exhibiting motion pictures, and the

decree set up an elaborate arbitration procedure under which theatre operators could obtain redress where they objected to the clearance theretofore granted over their theatres by one or more of the consenting defendants. Provision was made for arbitration tribunals, set up under the supervision of the American Arbitration Association and the Court, and an appeals board to which appeals from these tribunals would go. Under the decree there have been over four hundred arbitrations and over a hundred appeals. The appeals board has been continuously constituted of distinguished members of our Bar who have rendered a great service to the industry and the public. Apparently the Government plans to offer the decisions of the appeals board (48)

and to refer to certain of those decisions. At one time Government counsel indicated that they would be offered for the purpose of showing law violation through granting unreasonable clearances since the date of the decree. When the offer is made, counsel will have occasion to point out that the decisions are not admissible on any such theory, that they are only relevant to questions as to the sufficiency of the arbitration procedure provided in the decree to redress alleged grievances. Of course, as the decree shows, the arbitrators and appeals board were not deciding questions of violation of the Sherman Act. The criteria in the decree for their determination were quite different. We shall be glad to have the Court examine all of the opinions for the limited purpose for which they are relevant, because it will become apparent from them that the arbitration procedure set up under the decree was a most progressive development in providing a forum for the relatively prompt settlement of disputes in an area which is necessarily the subject of much difference of opinion.

As we discuss this subject of clearance, it will be readily apparent to the Court that this matter is one peculiar to this industry and that it cannot be dealt with properly or adequately by court proceedings, and that courts are not

equipped to deal with it, certainly not as well equipped as
(49)

the arbitration machinery that has been set up under the decree. It will become apparent, furthermore, that the broad remedial provisions have been generally effective and that very slight modifications would meet the few observations about it which have been made by the appeals board in their decisions. We believe the Court will thus find it unnecessary to concern itself with questions of clearance, that matter having already been adequately dealt with in the decree entered upon the consent of the Attorney General and the defendants who are parties to it. This being so, much that is said in the Government's brief and opening seems irrelevant. It is clear that the propriety of agreements for reasonable clearance was definitely determined by the decree. It was not an issue reserved by the Government for later trial. By the decree the Government conceded that some clearance is essential—there were no "ifs" and "buts" in the concession. Similarly, the decree recognizes the relevancy of admission prices to clearance since they are taken into account by an arbitrator determining its reasonableness. It cannot now be properly claimed that clearance agreements are per se illegal as price fixing devices, and that all such agreements must therefore be outlawed. Yet, as we shall see, the Government relies heavily upon clearance, not simply unreasonable clearance,
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but all clearance granted to affiliated theatres, to bolster its claim of nation-wide monopoly of exhibition.

Your Honors may have noted on some of these charts that Mr. Wright handed up, that many of them deal with a period prior to the date of the decree. They deal with pictures in 1936 and 1937 and clearances then prevailing. Of course the decree since that time has provided the forum in which the propriety or reasonableness of any of those clearances could have been determined.

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Certain other provisions of the decree will be mentioned during the trial but it is unnecessary to comment on them now.

In its present presentation—

Judge Hand: Is it a fact that much of the litigation before this Appeal Board is over clearances?

Mr. Seymour: Yes, that is the bulk of the work of the arbitration machinery and the Appeals Board. And the theatre comes in and says that it wants to get clearance changes and is heard, and sometimes they win, sometimes they lose, and then it goes to the Appeals Board where the results are as expected with an Appeal Board of review, sometimes they win, sometimes they lose. But the point is that they have a forum and they resort to it.

In its present presentation of the reserved issues upon which the Government asks the Court to grant the drastic relief of severing the defendants' interests in exhibition from their interests in the production and distribution of motion pictures, the Government has chosen to rest its case on relatively narrow grounds. In its request for divorcement against Paramount, the Government asks the Court to direct that Paramount dispose of its investments in exhibition companies carried on Paramount's books at over \$63,000,000. The sole basis of this severe and perhaps fatal amputation is a claim that the defendants which have an interest in motion picture

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theatres have combined and conspired to monopolize the domestic motion picture market. This claim is not based upon any assertion of an agreement or conspiracy made at any particular time by any of these defendants. No such proof is even hinted at. It is based rather upon a melange of unrelated facts, unjustified additions of unrelated theatre holdings, unrevealing statistics and isolated examples of license agreements which we will show are clearly authorized by the copyright law and essential to this business.

By taking the largest and most successful producers, who also own interests in theatres, the Government isolates large

units for attack but, since none alone is large enough, or powerful enough, for its purposes, they are arbitrarily lumped together and then their separate and independent operations are submitted to statistical analyses of dubious quality as if they were all one. This is the fatal weakness in the Government's case. For when the case is over the Court will be completely satisfied that the defendants' operations are independently conducted under conditions of most vigorous competition from the beginning of production to the last exhibition.

No artful labelling of completely independent transactions as "cross-licensing" can serve to manufacture a combination or conspiracy where none exists. It will, I think, (53)

be undisputed that any of the contractual arrangements which are woven together to make the Government's case, stem from lawful practices in the industry adopted independently long before any of the defendants had any interest in theatres, and, furthermore, that precisely the same practices occur in the dealings of these defendants and other producers and distributors of motion pictures with operators of theatres in which the defendants have no interest at all. In other words, the licensing procedures which are here challenged are precisely the same in dealing with theatres in which the defendants have no interest and whether or not the licenses are made by these defendants or by producers and distributors which are not defendants in this suit. So there is no genuine relationship between the practices challenged and affiliation of theatres with any of the defendants which could possibly justify the extinction of each defendant's right to own and operate or to have financial interest in the operation of theatres. We believe that the Court will be satisfied not only that the charge of combination or conspiracy is without substance, but that this industry is competitive in the highest degree, that these defendants—far from combining and conspiring together—are and always have been engaged in the most vigorous competition with

each other. It will be apparent, furthermore, that the public has benefited enormously through the independent competitive operations of these defendants in the constant development of better motion pictures, and that the relief demanded by the Government would confer no public benefit but on the contrary be most injurious to the interest of the public. Examination of the Government's brief shows no concern for this large public interest but only a response to the complaints of some exhibitors and producers who hope to obtain competitive advantages over these defendants. Attempts to fit the competitive facts in this infinitely complex industry into the traditional compass of a monopoly or of a price fixing combination or conspiracy must fail.

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Since the Government rests its case on the claim of combination or conspiracy between the defendants who own interests in theatres, it is hardly necessary to say that of course it could not be claimed that the mere ownership of interests in theatres by any one defendant alone was in itself a violation of law. The right to integrate the various functions of a business from manufacture to sale of the product (in the absence of illegal steps or a result of running afoul of such decisions as that in the Aluminum case) was established as long ago as the decision in the United States Steel case and in other decisions following it.

It is beyond question that no defendant with an interest in theatres has more than a very small fraction of the

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total motion picture theatres in the United States. For example—and I don't remember that Mr. Wright even told your Honors this morning the total number of theatres in the United States—for example, out of about 17,000 theatres in the United States Paramount has some interest in under 1,600, or about 9 per cent, and out of this number Paramount has stock control amounting to more than a majority in corporations operating only about 500 theatres, or something less than 3 per cent of the total theatres. The percentage of

theatres in which other defendants have interests is still smaller. Thus it is apparent that the mere size of any of these defendants or the position in the exhibition field of any of them standing alone is not subject to attack. It is only by the wholly unjustified tacking together all of the various and varying interests of all of the defendants who have any conceivable interest in theatres that the Government is able to arrive at anything more than a very small percentage. But even taking all the theatres in which all the defendants together have any interest whatsoever, the total number is only approximately eighteen per cent of all of the theatres in the United States. Whatever the statistical approach to this unjustified conglomeration, the percentage of the exhibition business actually enjoyed by all the theatres in which the several defendants are interested, falls far short of any percentage which could represent monopoly of motion picture exhibition.

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Despite allegations of the complaint of monopoly in production and distribution, the Government does not now press those claims. And indeed it could not, for it will become apparent as the case proceeds that in production as well as in exhibition, and indeed in all phases of the motion picture business, the defendants are in intense competition with each other, as well as with the several producer defendants who do not own theatres and a great number of so-called independent producers. As a matter of fact there has been and continues to be a consistent growth of both independent producers and independent exhibitors. Not only has there been a growth in the number of independent producers and independent exhibitors, but each of them has been earning more and more profits. It is perfectly apparent that the Government cannot claim that the activities of these defendants stifle the entry of new talent and capital in the production, distribution or exhibition of pictures. The developments in this industry are inconsistent with any theory of monopoly.

We are dealing here with an infinitely complex industry, serving an enormous number of people every day with a product of superlative excellence. It is estimated that more than 85,000,000 people see exhibitions of motion pictures weekly in approximately 17,000 theatres located in 9,000 different communities (57)

American films lead not only in this country, but in most of the countries of the world where in normal times over \$100,000,000 was paid annually for the privilege of exhibiting American films. The importance of a strong industry to the United States in the period of international affairs which lies ahead needs no emphasis. The amputation proposed by the Department of Justice is hardly conducive to that end.

It has long been recognized how important are pictures in educating all the peoples of the world to our democratic way of life and how important our pictures are in international commerce. It has been said that trade follows the motion picture. Foreign governments have recognized this and have not only placed trade barriers against our motion pictures but have subsidized their own producers in efforts to offset our supremacy in the world markets.

For a proper appraisal of the Government's claims it is necessary to examine the history of the industry and the background of its present structure and practices. The outstanding fact in this industry from its beginning has been the intense competition which prevails in it. This industry has grown from the most primitive sort of entertainment thirty-five years ago, to its present superb service without the air of a protective tariff or other Government assistance (58)

and solely as a result of talent and enterprise in the various companies and in the several phases of their activities, and the intense competition that has steadily improved the quality of pictures throughout the history of the industry. In order for the industry to supply the necessary pictures to the 17,000 theatres in this country, to assure the widest

access of the public to their exhibition, it has been necessary for each of the companies to set up or arrange for most elaborate machinery to assure each theatre of continuous service. This service must punctually supply motion pictures on precisely the day on which they are to be exhibited in each theatre throughout the United States, so that the exhibitors may, with reasonable certainty, plan their play dates, their programs and their advertising. The competition offered by each of the distributors, whether a defendant or not, to supply this demand by licensing as many of its pictures to as many of these theatres without exception at such prices as it may receive is tremendous. Under the spur of this competition producers have spared no effort to perfect the quality of the dramatic productions which they produce.

The best pictures often cost several million dollars to produce and additional amounts to distribute, and the constant increase in the cost of pictures, responsive to public demand for constant improvement, is a basic economic factor (59)

in this industry which explains many of the practices questioned by the Government and the reasons why those producing such expensive pictures must have at their disposal means for assuring adequate returns to make such productions feasible and profitable. One of the summaries to which the Government referred this morning indicates the increasing return of the more expensive pictures and it would be rather natural to assume, I should suppose, that better pictures and more expensive pictures brought a larger return than what those charts indicate. Most of the things of which the Government now complains are simply methods, which we will show to be proper, of assuring such returns.

The Government seeks to make much of the fact that admission prices charged by exhibitors usually vary with the run or time when the picture is shown in a community and of the fact that a provision for minimum admission prices is generally found in license contracts made between the defendants and exhibitors. It will become apparent that

these admission prices in reality are but a normal consequence of the economics of the exhibition business, that the actual prices charged are determined by the exhibitors themselves and not the distributors; that the public benefited rather than injured by the provisions for minimum admission prices, and that those provisions in no way offend the Sherman Act. (60)

At the outset, the business of production and exhibition of motion pictures must be distinguished from the business of selling gasoline, cardboard or any other ordinary commercial product. This business is primarily theatrical. It is not concerned with mere transactions in celluloid films; they are only the means of providing dramatic productions. The success of those productions depends not only upon the quality of the pictures but upon the public fancy and taste when the pictures are exhibited. This taste is subject to frequent changes affected not only by domestic and world events, but by many more intangible things. The films are merely mechanical instruments, conveying dramatic performances to the 85,000,000 people who see them weekly. The performances are staged and directed in a studio with the hope that their effective presentation to the public will return a profit to all those concerned in production, distribution and exhibition. Such a business is highly speculative, just as the legitimate stage is. Those concerned in producing extremely expensive pictures of this speculative character necessarily require the full protection which the law allows. Counsel for the Government this morning neglected to mention the crucial fact in this business, the fact which is at the bottom of the licensing procedures and practices which he complains of, the fact that these films are all copyrighted. (61)

The first and crucial stage is copyright protection which covers the presentation of the dramatic performances recorded on films precisely as it covers other dramatic performances. Without such protection no one could afford to

expend the effort or cost involved in dramatic production either for the stage or the screen. The copyright statute clearly protects the exclusively right to copy the film and to use all or any part of it in the presentation of the dramatic performance so copied, and the statute also protects the exclusive right to that performance itself, and makes that right exclusive by whatever means it may be reproduced. Thus motion pictures are copyrighted and are exhibited in theatres under license agreements. There is a grant of a limited right to exhibit in each license contract, a right to exhibit the dramatic performance recorded upon the film upon specific days and to return the film immediately so that it may be licensed and exhibited by others in a most elaborate and complex method for providing all the theatres licensed with the films when they require them. So we are not dealing here with the sale of goods, but with licenses to perform copyrighted dramatic productions and bailment of positive prints which are the mechanical means for presentation of those productions upon the screen.

In striking contrast with the process of distributing ordinary articles of commerce by the sale of as many units as possible to as many customers as can be found willing to buy, the distribution of motion pictures without exception is only possible by licensing the single dramatic production for performance in one theatre in a community after another, the exclusive right of exhibition always being retained except as limited rights are granted out of it. That is a basic fact in this industry; it is a fact that has existed from the very beginning; it is a fact which applies not only to the activities of these defendants as distributors of motion pictures but to the activities of all distributors of motion pictures. The Government suggests that somehow there is something peculiar about the fact that all motion picture licenses proceed on the theory of copyright, and it seems not surprising that copyrighted articles are treated as such. The problem of providing the films by which such dramatic production are

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produced on the screen, is at the basis of the practice in this industry of granting so-called runs. The prints of these films are expensive. It is this expense added to the expense of the original production which must be recovered before the producer can realize any profit, so it is essential for a producer to so handle the prints of these films as to assure that return and profit. In any exhibit of a motion picture in a theatre a positive print of the film must be furnished to the exhibitor and returned to the distributor for subsequent (63)

license after it has been exhibited. The cost of each print in black and white runs from \$150 to \$200 per print. Prints in Technicolor cost from \$700 to \$900 each and sometimes more. The average film rental paid by a small theatre covers but an infinitesimal fraction of the cost of a single print. Whereas a large and well appointed theatre showing a picture on first run at an admission price of \$1.00 or more may pay a rental of \$150,000 or more, the same picture will later be licensed to another theatre for as little as \$10 or \$15 for a three day run at an admission price of only 10 cents.

The number of prints required for national distribution of each picture depends upon the number of theatres which must be served. Since these prints are fragile and are worn out in use they must be inspected after every exhibition. The slightest distortion of the sound track on the film will impair the sound effect.

The number of prints each film requires varies from 200 to approximately 350 per picture. The average print cost of every picture ranges between \$30,000 and \$40,000 and is often much higher. It is usual for all well managed companies to keep cost as low as consistent with good service and it is apparent that such cost can only be kept down by using each available print in successive exhibitions in different theatres as often as possible.

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The number of shipments required of the prints of the films produced by all producers runs into many millions a

year. It would obviously be impossible to operate such a business by providing a separate print for every exhibition. The cost of such prints alone would be prohibitive. So it is necessary for the prints to be distributed in successive runs and for each exhibition, whether first run or subsequent run, to realize the largest possible revenue for the distributors. It would be utterly impracticable for competing theatres to show the same pictures at the same time, as there would not be enough prints for that purpose and the value of the picture would be almost completely destroyed. Such a practice would drastically reduce the number of people who would see the pictures because the time of their exhibition in any community would be thus restricted. At the same time the respective values of each successive exhibition would be reduced and the distinction between them would be wiped out. Maintenance of this distinction, as we shall show, has definite advantages to the public.

The value of a picture to an exhibitor depends upon its freshness and its element of freshness determines the terms which the exhibitor is willing to pay to the distributor. The first-run exhibition ordinarily produces the highest revenue to the producer because the picture is then first available to

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the public, and it has the highest element of freshness. But the first-run exhibition is of great importance to subsequent runs as well. Theatres showing the pictures first in the large cities spend large sums in advertising the films which they exhibit, they are commented upon in the newspapers and by word of mouth. Such publicity redounds to the benefit of all subsequent-run exhibitors by stimulating popular desire to subsequent runs. There is some analogy to dramatic producer and the exhibitor, but is also of great value and benefit to subsequent runs. There is some analogy to dramatic productions on the stage where the Broadway run is the most valuable, but the subsequent road runs are of importance. The success of the road run depends to a large extent upon the advertising and popularity of the Broadway showing. But the analogy is not perfect because 'whereas the stage

production on the road ordinarily has different and less prominent players, the motion picture is the same and provides identical entertainment for the public whether it is shown first-run at a relatively high admission price or at a later run for 10 cents.

In view of the importance of the first-run to a producer and exhibitor it is natural to find that the first-run of a picture goes to the best, most expensive and most luxurious theatre in the community. The Government attaches weight to the fact that in many of the large cities of this country (66)

theatres in which one of the defendants has an interest license the right to show many of the best pictures first-run. The evidence will show that this is because these theatres are the best available theatres in their communities. But the Government's picture of the situation as presented to the Court is by no means complete. In many of the cities where a defendant's theatre enjoys some product first-run there are theatres owned by independent exhibitors which have the right to the first-run of comparable product and in some communities all of the theatres showing films on first run are owned by independent exhibitors.

Whether or not a theatre has any affiliation with a defendant, it is equally necessary for the distributor to protect his revenue from each successive exhibitors so that he will be able to realize the largest possible revenue from first as well as subsequent-run exhibitions. The terms of the license contracts for first-run exhibition and subsequent-run exhibition are generally the same whether the exhibitor is affiliated with one of the defendants or not. There is nothing in the contractual provisions, of which the Government complains, related peculiarly or specially to the nature of any relation of any exhibitor with a distributor. The whole process of distribution and exhibition and the respective interests of the distributor and exhibitor therein are precisely the same whether the exhibitor is a so-called affiliate or a so-called independent.

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The success of any theatre (whether affiliated with a defendant or not) depends not only upon the right to exhibit during the period allotted for exhibition, but also upon assurance that the value of the right to exhibit shall not be destroyed by unfair competition of subsequent-run theatres charging lower admission prices. This assurance must extend for a reasonable time after the prior exhibition is ended. Obviously a theatre, operating at high cost and spending large amounts to exploit a picture first-run, cannot operate successfully and profitably exhibit pictures, for which it pays the higher license fees and charges higher admission prices, if theatres in the immediate neighborhood in competition with it, are able to advertise or show the same picture at the same time or a few days later for much lower admission prices. The same need for assurance against this type of unfair competition exists between subsequent runs. This so-called protection of the right to exhibit in an agreed sequence and under agreed conditions is known as clearance. Both the distributor and exhibitor have vital interests in reasonable clearance. The distributor provides for it in order to assure payment of the agreed license fees. The exhibitor must have it in order to enable him to meet the competition of subsequent-runs at lower admission prices and to pay the fees he has agreed to pay.

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Judge Hand: What has Appeal Board done about these clearance cases? Can you give us a little statement of it to show they handle them?

Mr. Seymour: I do not know that I can give your Honors the precise information, but my brother Caskey can because he studied this particularly, but what happens is that an exhibitor complains that clearance over his theatre is too long and he vouches in the other theatres that have clearance over his theatre and then, in accordance with the terms of the decree, which provide the various considerations which the Arbitrator is taking into account, the Arbitrator pro-

ceeds to decide whether his clearance ought to be reduced or whether it is all right, and then that decision can be appealed by either side to the Appeals Board.

Judge Hand: What sort of things do determine in the form of the decree?

Mr. Seymour: The decree lists the various considerations, such as admission price, character of the theatre, character of the operation, so on. They are all set forth in the decree. Those are the business considerations.

Judge Goddard: I would like to ask Mr. Wright, if I may, what is the Government's position as to clearance now? Before, the Government seemed to recognize that clearance was an essential feature of the business. The next question—perhaps I am ahead of it—is how the Government would
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regulate clearance, a matter that is determined by so many different elements?

Mr. Wright: Answering the questions one at a time, there is quite an important qualification, I think, that neither your Honor nor Mr. Seymour stated there. What we conceded was that reasonable clearance was essential.

Judge Goddard: You concede that?

Mr. Wright: At that time. And I would say that as of today, we still would not object to reasonable clearance as such, although there may be a difference in our concept as to what is reasonable and what is unreasonable. But that qualification was always there and still remains.

In so far as this question of how the problem of regulating clearance should be approached, as I say, the consent decree was an experimental effort to regulate it by a fairly complex administrative procedure, which was set up within the limits of that consent decree.

Judge Hand: Do you think they have done it badly?

Mr. Wright: Within the limits that we imposed, and that are inherent in such a system, I think they have done it well, but the job, in our opinion, just cannot be done effectively that way; that is, the only way in which you have a genuinely

competitive film distribution system, in our view, is to leave the determination of clearances to free competition and not (70)

have a system in which these producer-exhibitor defendants essentially administer it: Imposed on top of their administration was this consent decree system but, for reasons which are too complex to discuss here, the net result was—and which are discussed fully in the preliminary briefs that we filed on the motion for preliminary relief—the result of this arbitration system was simply to intensify clearance competition as among the lower runs, who follow the runs of the producer-exhibitor defendants, but it had no effect whatsoever in so far as disturbing the dominant run positions that these producer-exhibitors and defendants maintain in the cities referred to by our statistical data.

Mr. Seymour: I have the copy of the decree before me. Does your Honor want to have me read the various criteria? I mentioned some of them. The others are set forth—the business considerations which enter into the decision. What the Arbitrator did was to proceed to review the business judgment of the producers and exhibitors and correct it, as they thought differently about it. They were an objective method of review.

The precise amount of clearance is fixed by negotiation between the exhibitor and distributor, although of course once it is agreed to and in the absence of changed conditions, it is likely to remain substantially the same in succeeding (71)

seasons during which the exhibitor uses the product of that distributor. The arbitration system created by the Consent Decree is designed to and does provide ideal machinery for reviewing the business judgment exercised in agreeing upon such clearances.

The license fees charged by distributors for the exclusive privilege of limited exhibition granted in license contracts are ordinarily expressed in terms of a flat rental or a percentage of the gross receipts of the theatre from exhibition

of the picture. No exception can possibly be taken to either method of assuring compensation for the privileges granted by the producer pursuant to rights conferred upon him by the copyright law. Distributors, generally, believe that percentage rentals are the fairest method of obtaining a fair share of the rewards attributable to their products; they are also fair to exhibitors who thereby avoid high rentals on pictures whose box office results are disappointing. The terms of such percentages are matters of negotiation between the distributor and exhibitor, as are the terms of flat rental fees. Where a percentage return is provided for, the contractual provision giving the distributor the right to inspect the exhibitor's books is a necessary precautionary measure to assure full payment of the distributor's agreed fee. In the Government's brief, I want to comment on it briefly, although (72)

it was not mentioned in argument, they make some criticism of the reservation by the distributor of the right to make sure he is not cheated by the exhibitor. No evidence can be offered of abuse of such provisions which are universally used by distributors solely for their own benefit and protection and not for exchange of information with others. It is merely fanciful to suggest, as the Government does, that such provisions are used to exert pressure upon exhibitors for the sale of their theatres. If percentage arrangements are permissible, as we think they clearly are, it is surely not improper for the distributor to arrange assurances that the provisions are lived up to. It is hard to imagine a more proper provision than one for inspection of the books of the exhibitor.

Thus it is apparent that licensing according to runs with clearance provisions protecting the right of exhibition granted, are the necessary by-products of the copyright law and of the economics by which exhibition of pictures is carried on. The fact that Government counsel, unfamiliar with the practical problems of distribution and exhibition, think that the business might be conducted in another way hardly

justified interference with or penalties for the exercise of clear legal rights.

Of course, like all contracts, these license agreements (73)

may be said to involve restraints, but they are plainly reasonable and well within rights given by the copyright law as well as the general law. They lend no support to the claim of combination to monopolize which is the Government's case here.

It is the object of the distributor to select the best theatre whose operator is willing to deal for his product for first-run and to license it as widely in subsequent runs as possible. In choosing its customers for first and subsequent run, the distributor naturally tries to select the theatre for each run which he believes will best serve his legitimate business interests. In this process the distributor is exercising his normal and proper right to select his own customers for the presentation of his copyrighted dramatic productions. And I understood Government counsel to concede this morning, in answer to Judge Bright, that it was the distributor acting alone who made the decision on selection of first-run. The same thing applies on subsequent runs. One of the complaints of the Government appears to be that the defendants who own interests in theatres often select the theatres of other defendants for the first-run exhibition of their pictures. The proofs will show that this selection is due to the superiority of the theatre selected and that it is not the product of conspiracy or agreement. Precisely the same criteria are used in selecting first-run outlets where no defendant owns (74)

any theatre or only some of them. If no defendant owned any theatre anywhere, precisely the same criteria would be applied and there would be precisely the same need for the same provisions of the license contracts, the arrangements for clearance, etc., to protect the distributor's revenue from each successive run. Indeed, it will become increasingly evident as the case proceeds that basically Government counsel want to see this business conducted in

some other way despite the fact that the very nature of the business requires precisely the methods which are here challenged. And it will, furthermore, be evident that those methods are quite unrelated to the interests of the defendants in theatres, and that these theatres are treated the same by other distributors as though they were owned by independents.

Whether owned independently or by defendants or by corporations in which defendants have a small or a large interest; all theatres exhibiting motion pictures in area are in competition with each other. The first-run theatres, how-
 defendants' several interests in theatres having first-run theatres but with all theatres in the community. A member of the public is always free to choose when, where and at what admission price he chooses to see a particular picture. It is the same picture whether exhibited first-run or at the last run. This competition is constant, goes on in the minds
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of the public every time they desire to see a picture. Thus defendants' several interests in theatres having first-run must be compared with the total theatres of all kinds and not considered as an unrelated market.

Although the Government now appears to abandon claims which it made in its Amended Complaint with respect to conspiracy to monopolize production, an appraisal of even its present case makes desirable some understanding of methods of production and of the intense competition which exists between all of these defendants and other producers at the production level as well as at the final level of exhibition.

I am sorry to be so long, but I think if I give you this background now it will save time later on, if you will bear with me. I think Judge Goddard may recognize that some of the material he is now hearing he heard from my distinguished colleague, Judge Thacher, five years ago. And I regret that other engagements prevent him from presenting this himself today.

The production of a motion picture does not begin in the studio. It begins in the acquisition of the story which is to be dramatized. There is the most intensive competition between each of these defendants with other producers for the acquisition of such stories, as has been repeatedly

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attested by newspaper accounts of bidding between various producers for desirable stories. When the story has been acquired, the script must be written. This task is performed by highly paid experts skilled in dramatic art. When the script is prepared, problems of casting begin, with emphasis upon the leading roles and consideration of the stars who can best fill the parts to the public's satisfaction. Occasionally, stars are borrowed or loaned to other producers to enable them to complete the desired cast. This is done where it is believed it will forward the interest of the star and benefit the producer, but the ultimate pictures produced are competitive. The practice is relatively universal and there is not the slightest basis for assuming that it affects the competitive relationship between the producers involved. After a cast is selected, the work of production begins; settings, costumes and stage properties must be produced with detailed historical accuracy. When all this has been done, rehearsals start. The production of silent pictures was simple compared with the rehearsal of sound pictures. The latter involve the greatest perfection in speech, music and sound effects. Each day's work must be scrutinized during the night and only accepted as perfect when no flaws can be discovered.

No effort is spared in striving to produce the best picture. Each competitor strives to excel with varying degrees of

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success. Naturally, in the course of such competition some pictures of some producers do better than others. But it will become apparent that this fact, as well as the respective box office receipts, bear a direct relationship to the quality and showmanship of the production and the critical ability

to gauge the public taste at the time of exhibition. It has become the fashion, to which Government counsel and even defendants' counsel may occasionally succumb, to speak of the defendants in this case as if they were in one group and to call all other producers independents, as if they are somehow in a different category. The only sense in which that is true is that other producers, not defendants here, are independent of the Government's attempt to shackle their competitive abilities and destroy essential parts of their businesses. Each of these defendants is an independent producer, whether or not it has any interest in theatres. Outside of the defendants in this suit, there are many successful producers. They have produced a number of fine pictures in recent years, pictures which they have exhibited in theatres in which these defendants are interested as well as others. The non-defendant producers are amply financed and equipped to produce fine motion pictures. No one with talent and sufficient capital is excluded from production in this industry. Of course, there are failures in this as in any (78)

other industry. Absence of adequate talent or adequate capital may produce a failure. But nothing in the conduct of these defendants or in their interests in theatres operates to exclude or limit the opportunity of producers with the necessary talent and capital.

Some outline of the nature of the production and distribution organization of Paramount may be desirable. I am about to go into a treatment of this Paramount as a separate organization in this discussion. Would your Honors like to have me continue or would you rather recess now? I cannot finish before lunch, I assure you.

Judge Hand: We will take a recess until 2.10.

(Recess to 2.10 p.m.)

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AFTERNOON SESSION

Mr. Seymour: I am now going to discuss for a little bit the organization of the defendant Paramount so that your Honors will see how that company does its business.

The production department is located in Hollywood and is in charge of a vice-president of the company. Paramount is also presently planning to produce certain pictures abroad as it did before the war. There is a branch of the producing organization at the Paramount office in New York. At the present time there are approximately 3,349 people on the payroll in the West Coast studio. Paramount makes approximately 36 feature pictures a year. It has made a greater number in the past. War conditions compelled it to make a smaller number than theretofore. After a tentative program of production for a motion picture season (which begins September 1) has been set out, individual production is assigned to producers and producer-directors in the studio. The studio employs normally about 15 directors. A large staff of writers is retained from time to time. The program of pictures for any one year is released at the rate of about one picture a week starting September 1. To see the amount of planning which must go into an annual program and taking the program for 1945-6 as an example, the normal process of production of that program would be as follows: In November, 1944, a meeting was held in Hollywood between the (80)

heads of the studio and the top executives of the company in New York, including the president and the heads of the foreign and domestic sales department, at which time the studio heads presented on paper the material available for the 1945-1946 program as to producers, producer-directors, directors, stars, players and writers. It was then determined how many pictures and plays would be needed for that program and the amount of money that could be expended in that production. The material on hand would be analyzed.

Out of this discussion there would be evolved a group of pictures totalling the number required, estimated to cost what would be spent and this would constitute the tentative program for 1945-1946.

Following this meeting, the schedule of production which I have outlined would be followed, with many changes during the course of production. The normal process of evolution of an individual motion picture is as follows: Paramount is continuously combing all sources of story material in all parts of the world for satisfactory stories. In its New York production department the company has a story staff of specially trained men and women who are working in connection with the Paramount studios and combing all story sources, outside of Hollywood. These include books, magazines, stage plays and hundreds of original stories. In Hollywood the story staff combs the sources of stories there. The stories so accepted are synopsisized and analyzed. Upwards (81)

of 7,500 stories are thus handled annually. Stories which seem to have a germ of a picture in them are sent to the Hollywood studio's story head and the studio story head submits them to the head of the production department to be produced if they are recommended. Studio heads make the final decision. Once the story is bought it is turned over to the producer, whose duty it is to turn it into a picture. The studio writing department obtains a trained writer to adapt the story to the screen. When the script is completed the players are chosen and a director is selected. The financial department head estimates the cost. Then all the elaborate procedures for casting, costuming, settings and supplying music are invoked. After the picture is completed it is tried out in Hollywood. After the trial, changes are sometimes made. Thereafter a final "master" positive print is made and allotments of the prints are made to each Paramount exchange for release to each Paramount customer. The Paramount exchanges are wholly independent of those

of other companies. It is through the exchanges that the distribution of prints is made.

Every other producing company has a production organization somewhat similar to Paramount in the respects mentioned. Competition between these efficient business units is extremely keen all along the line from the search for story material to the evolution of the final picture. It is a continual race to secure good story material. There is the most (82)

intense bidding between companies for good story material and successful stage plays. There is, furthermore, the most intense competition for motion picture talent. Each company is feverishly hunting for new talent. A new player who makes a success on Broadway is immediately sought after by picture companies on competition. Actors' agents stir up the competition, keep it going. Once a player is signed up, there is constant competition to take him away from the studio which has him under contract. The competition for writers, directors and skilled technicians is keen.

The technical and other difficulties of production are enormous, quite aside from the highly speculative nature of the business. Weather, temperamental difficulties of stars, are among the daily problems in producing a picture.

Success in this industry is not merely dependent upon the ability to make fine pictures, but it is primarily conditioned upon an uncanny judgment in the selection of pictures which will appeal most strongly to the patrons of theatres at the time when the pictures are released for exhibition many months after they have been selected for production. The ability to anticipate public taste in a picture is the only way to success, although, of course, the expenses incurred in this procedure are also of importance. The genius of successful showmanship is the best guide to success and successful (83)

producers do not neglect any possible indication of trends in the public taste and interest and in the types of motion picture plays which audiences most enjoy. Actual box office

receipts in typical theatres located in representative communities record the results of success and failure in producing pictures months before their exhibition and it is of the utmost importance to the producer to have intimate and accurate knowledge of the general public reaction to the various pictures as soon as they are shown upon the screen.

The integration of theatres with production affords an accurate teaching experience as the basis for evaluating future products. It makes the producer directly responsible to the audiences for whom the pictures are made.

The judgment of executives long experienced in wrestling with this problem in all three branches of the industry is brought to bear upon it; public taste in current news, in types of fiction, in plays and in the personalities on the stage and screen are important materials to be considered in determining the trends in public taste in these dramatic performances. Sensing these trends involves an intimate understanding of human nature and long experience in judging the feelings, thoughts, tastes and desires of people; it is the one essential quality of successful showmanship. Thus the most vital problem of all is to decide what pictures to (84)

produce in order to capture the interest and satisfy the general tastes of the theatre-going public. These are the qualities which each company seeks to have in its executive leadership. These are the qualities which enable companies to compete successfully with each other. These are the qualities which cannot be monopolized.

Prior to the consent decree, pictures were released for exhibition during annual seasons commencing in September, but the program then released had been under consideration and in production for many months. The interest of the public was under constant consideration. By May or June the program of production proceeded to a point at which it fairly evaluated the pictures that were to be offered for exhibition. A convention was then held of those who were to engage in the distribution of the pictures for the coming season to commence the following September.

The purpose of these Conventions was to furnish all available information regarding the pictures to be released and to inspire enthusiasm in those who were to distribute them. Theoretically, the selling campaign commenced immediately after the convention, but under the spur of competition, pictures were often licensed for exhibition several months before the convention was held.

Each distributor endeavored to hold its convention and to commence its selling campaign before its competitors. (85)

These efforts among distributors to begin the licensing of pictures for exhibition at the earliest possible moment evidenced the sharpness of the competition in which they were engaged. When the conventions were over the salesmen returned to their firm exchanges and solicited exhibition contracts within the territories of their exchanges. The salesmen in the ordinary case negotiated directly with the exhibitor and endeavored to arrange the best possible contracts. If the exhibitor was willing to license the pictures on terms the salesmen approved, the exhibitor signed an application which, if ultimately approved by the branch manager, the district manager and the home office, was accepted and executed by the company and a contract thus executed was returned to the exhibitor. In this process of distribution there was intensive competition between all of the distributors in licensing the pictures to exhibitors.

Since the consent decree, that is, since the selling season of 1941-42, pictures have not been licensed by a season's output but instead, pictures have since that time been licensed in groups not to exceed 5. Under this system of selling, national annual conventions became not only unnecessary but meaningless, for the problem of selling became more intensified and the competition greater, since the selling job had to be done, not once a year to an exhibitor, but the exhibitor had to be sold each group of not to exceed 5 pictures as they (86)

were finished, and were trade shown in the respective exchange districts.

Instead of holding annual conventions, therefore, it has become necessary to hold frequent sales meetings regionally throughout the country, several times a year, in order to acquaint the sales personnel with the character of the motion pictures in each group as they were produced, and the policy of the company in licensing them to the exhibitors. Paramount has independently continued this practice of trade showing despite the fact that the provisions of Section III and IV of the consent decree lapsed by their terms several years ago.

As I have already indicated, this method of selling under the consent decree has not lessened competition between the various motion picture distributors but has in fact intensified that competition, and the keenest competition and rivalry exists with each group of pictures.

The process of providing necessary prints to the 10,000 or more theatres which Paramount supplies requires the maintenance of a national system of distribution through which Paramount competes with other distributors in its effort to license theatres.

And your Honors will have in mind that this figure of 10,000 theatres is to be compared with the figure I gave you this morning, the 200 to 350 prints which have to serve the (87)

10,000 theatres in a series of runs.

Paramount's distribution department has under its supervision 31 film exchanges covering varying amounts of territory which are selected for convenience in servicing the customers in an area. These exchanges are located in the most important centers. The Paramount exchanges are wholly independent of the exchanges of other distributors and compete actively with other exchanges. Each film exchange is under the direct supervision of a branch manager who is directly responsible to the district manager in whose district his exchange is located. There are four division managers and the general sales manager who have their offices in New York. Prior to the consent decree, there were three

division managers, however, under the method of selling under decree which required sales in groups of not more than five, the sales force was augmented and also a fourth division manager was added because the number of transactions was multiplied many times. It is impossible for the general sales manager personally to approve or reject every license contract that is made. Such authority is delegated to the division managers within their respective divisions. The task of solicitation is primarily imposed upon the salesmen of each of the film exchanges.

In their effort to sell Paramount pictures these salesmen constantly meet competition of all other distributors, including the other defendants in this action. Each company publishes in various forms advance announcement of its pictures and pursuant to a practice which arose in conformity with the provisions of the consent decree which have now lapsed, pictures are trade shown by most of the defendants. Competition in licensing pictures has always been vigorous and each of the companies jealously guards all information with regard to their own negotiations with exhibitors. There is no limitation whatever on the freedom of any one of them imposed by any others by agreement or otherwise, and there is no exchange of information between them which can influence their individual action as competitors in the business of licensing pictures.

It is natural since all of the distributors are dealing in the same type of business with similar problems and having similar rights under the copyright laws that many of the contractual provisions used by them should be similar. As the proper amount of clearance between given theatres became established and each exhibitor became accustomed to a certain amount and to insist on the same clearance that he was able to secure in his dealings with each distributor, it was natural that the clearances which he obtained from those that he dealt with should generally be similar. Obviously no exhibitor would willingly subject himself to a

shorter clearance in favor of a competitor than he had before
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or than he could get from any distributor. Conversely no subsequent run new exhibitor would accede to a longer period of clearance in favor of his competitor than he bargained for and received from another distributor. Such similarities cannot be regarded as significant of conspiracy. Under the circumstances, they are entirely consistent with independent dealing which we shall show is the fact.

With respect to the provision in contracts fixing a minimum admission price for exhibition of the particular pictures licensed, these provisions are indispensable to the protection of the revenue of the distributor. They apply only to the showing of the copyrighted pictures licensed to an exhibitor by the distributor with whom the license is made.

And I want to explain that a little more fully, because Government counsel have simply seized upon it as an alleged price-fixing scheme without any reference to the economics of the business or to the fact that we are dealing here with a copyrighted product.

The license fees which any exhibitor pays for a picture licensed are predicated upon the conditions then in the area in which the theatre is located, and the minimum admission prices inserted in the contracts are, as the Government concedes, generally those which are then currently being charged by the exhibitor and those which he fixes.

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Obviously if, while the license agreement is in effect, the prior run exhibitor lowers his admission price below a certain figure, he thereby affects the admission prices which a subsequent run exhibitor is able to obtain, for, as the Government concedes, the later run usually must and usually does charge a lower admission price. If the prior run admission price is lowered, the subsequent run must lower his admission price and cannot afford to pay that which he has agreed to pay, and will in consequence be obliged to ask the

distributor with whom he has contracted for a reduction in the license fees which he has agreed to pay.

Conversely, if the subsequent run reduces his admission price below the minimum specified in the contract, he thereby injures the prior run as well as those who have runs subsequent to his own and all are therefore obliged to lower their admission prices, and they in turn are unable to pay the licensee fees which they have contracted to pay.

Therefore it is abundantly clear that for the protection of the distributor's license fees, the distributor must insist that the rules of the game shall not be changed during the game—that is, during the relatively short period covered by the sequence of exhibitions of a particular picture in a particular competitive area.

It is essential to the satisfactory operation of the exhibitor's own business to have an established admission (91)

price. No exhibitor would on ordinary bookings have a different admission price for the pictures of one company from that of any other. He, not the producer, really fixes the admission price. The inclusion of the same price in license contracts from different producers is no evidence whatever of agreement or concert between the producers. It merely reflects, of course, the standard procedure of the particular exhibitor.

The economics of the business which require and justify the provision for minimum admission price are simple. The producer wishes to receive the highest possible revenue from each run, and is, of course, entitled to try to receive it. The exhibitor must have reasonable assurance against unfair competition in lower admission prices from subsequent runs. If an exhibitor who pays, say \$5,000, rental for a film and whose admission price is 75 cents, does not have reasonable assurance that a subsequent run exhibitor will not be able to exhibit at the same time or shortly after him at such a lower price as will entice away his patronage and make it impossible for him to pay the higher rental which he has

agreed to pay. Accordingly, the exhibitor is interested in making sure that the subsequent-run exhibitor will not exhibit at a cut-throat low price. Only by knowing that the (92)

producer will deal with the subsequent-run on a basis of a reasonable minimum price consistent with the customary practice and the relatively lower value of the subsequent-run, can he with confidence undertake to pay the rental asked by the distributor. Incidentally, it must be noted that in all cases the license contracts merely fix the minimum price. No contractual provision inhibits any maximum which the exhibitor desires to charge. Furthermore, as in the case of other license provisions, the existence of defendants' interests in theatres have nothing whatever to do with this requirement. The same requirement is contained in license contracts to exhibitors unaffiliated with the defendants. If the defendants owned no theatres at all, the economics of the business would require that the exclusive rights granted by the copyright law be protected, by such reasonable provision, against destruction.

It is argued by the Government that provisions in first-run license for minimum admission fees and clearance enables the theatres somehow to control the admission prices and business of subsequent runs, and by tacking the business of independent theatres to the business of affiliated theatres, the Government seeks to inflate the percentage of business actually enjoyed by affiliated theatres. Such an attempt must fail for it is bottomed upon specious reasoning. Theatre operators determine their own admission prices. They do (93)

so, whether they are affiliated or not, and whether they are operated first or subsequent-run, with an eye on what their competitors customarily charge. The price charged by a subsequent-run operator is not fixed by any agreement between the distributor and the first-run operator, but is fixed by the subsequent-run exhibitor himself with the view of making it low enough to induce patrons to wait until they can see the picture in his theatre. Ordinarily this price will be less

than charged by the first-run but under some circumstances a subsequent-run operator can and does charge as much as, or even more than, a first-run. No ceiling prices are fixed by contract. The only real ceiling that may be said to exist is due to the economic fact that an exhibitor showing the product after it has lost some of its initial freshness and drawing power, ordinarily must charge less for the opportunity to see it. The only floor on prices is determined by the copyright owner in the lawful exercise of his right to license his product upon such terms as will ensure him a reasonable reward for his copyright. These are some of the considerations which point up the fallacy of the Government's claim that first-run theatres control more than their own business, and which show the futility of the Government's attempt to inflate the alleged monopoly of affiliated theatres to include independently owned and operated subsequent runs.

In addition to negotiating license contracts, it is the function of each film exchange when the release dates are known to book the pictures for exhibition on specific dates in each of the theatres where they are to be exhibited. Because of the limited number of prints which can be made available to each of the film exchanges, and because of the necessity of spacing prior and subsequent exhibitions, the booking procedure becomes highly technical and it is the function of the film exchange to arrange these bookings in theatres with which they have contracts so that these contracts may be fulfilled in all details with respect to the length of runs and clearances. The booking schedules must be so arranged and delivery dates so fixed that the exchange will be able to deliver the picture on the date fixed for its exhibition and to carry out fully the arrangements for the delivery of the prints and for their immediate return to the exchange after exhibition for repair and inspection before delivery to another exhibitor. There is no time for any print to be idle, they are constantly in motion, on exhibition or under repair.

Having dealt with production and distribution it is now appropriate to describe the theatres in which Paramount has some interest (which investments the Government asks the Court to strip away) and to review briefly the history of (95)

this integration between production, distribution and exhibition. In the course of this review it may be noted that not only is there no justification for the Government treating the theatres in which Paramount has some interest as lumped together with the theatres in which other companies have an interest, but it is even improper to lump together the theatres in which Paramount has an interest. The Government sometimes describes such theatres as if Paramount owned or controlled a vast circuit of over 1,500 theatres. This is completely contrary to the fact. In the following history it will become apparent that Paramount got into the exhibition business as a competitive measure and that when the Government urges that it should now be forced out of that business it is seeking not to advance competition, but to stifle Paramount's ability to compete.

As of March 31, 1945 Paramount had some financial interest in companies having interests in approximately 1,500 theatres. They are located in approximately 44 states. Of the theatres in which Paramount has any interest, there are only about 500 in which it has an interest representing more than 50 per cent of the voting control. The theatre investment is of very substantial importance to the company, being carried on the books at approximately \$63,000,000. Paramount's return from its investment in the companies (96)

operating theatres is important as well as is its revenue from production and distribution. This business fact requires of this company miscellaneous services in the operation of theatres if the company is to survive. These theatres are not maintained or operated as instruments of monopoly. They are business responsibilities in which the stockholders of Paramount are intimately concerned. The executives of the

operating companies are bound to so operate and manage these properties that they will produce the largest revenue by providing the best entertainment in competition with theatres of comparable quality, many of which are owned by other defendants in this case, but others of which are owned by those in no way connected with the case. The Court will recall that the total number of theatres in which Paramount has any interest amounts to less than 9% of the total theatres in the United States.

It might be well to say here again that the Government's attack on theatre ownership is not based upon any concern for the general public for whose entertainment or edification pictures are produced. It is based solely on the relatively unimportant segment of theatre competitors of the theatre-owning defendants who would like to see these defendants out of exhibition competition. It must be apparent that such a result would very surely deny to the public pictures (97)

of the quality now produced for which the theatre-owning defendants now have some assurance of a market, justifying such substantial speculations.

Paramount has recognized from the start the necessity of procuring the most able and competent showmanship in the management of theatres in which it is interested and has been keenly aware of the fact that the successful operation of a modern picture theatre is primarily dependent upon the showmanship and ability of the local managers and co-owners to operate their theatres in the manner most satisfactory to their local patrons. Since Paramount emerged from its reorganization in this Court in 1935, and even before that time, beginning in 1932, the activities of the home office in respect of the operation of theatres have been completely decentralized and placed in the hands of local managers and operators. In most cases, these local operators own substantial financial interests in the owning or operating companies, or having profit sharing management contracts

which give them incentive to produce results from their operations without regard to what other Paramount associates do. There are only two theatres, the Paramount Theatre in New York, and the Newman Theatre in Kansas City, which are managed and operated from the New York office. All other theatres, including those in which Paramount owns the entire interest, are operated by local operators who are responsible (98)

for the operating policies of the theatres under their control. These men are given entire freedom in negotiating exhibition contracts with the salesmen of the various distributors including those of Paramount and are permitted to buy pictures for their theatres quite independently of each other and of the home office, predicated upon their local needs and the public tastes in their communities, and their ability as business men to make the best bargain for the pictures they need in order to operate their theatres successfully. This fact is persuasive evidence that no such combination or conspiracy as the Government suggests would or could exist.

The wholly owned theatres, that is, the theatres operated by companies which are wholly owned, unquestionably assure Paramount an important outlet for its product. The circumstance that other producers license their pictures to these and other theatres in which Paramount has an interest can give rise to no inference of monopoly or conspiracy. Every producer attempts to license his pictures for exhibition in the best theatres, and where Paramount or another defendant has the best theatre it is natural that other producers should license their pictures to them just as they license to the best theatres owned by non-defendant exhibitors.

With respect to the theatres operated by companies in (99)

which Paramount owns not more than a 50 per cent interest, the management of those companies is, in fact, controlled not by Paramount but by the local men, usually those owning the remaining financial interests. This results in many

cases from the continuation of the same management which had made the operation successful before Paramount invested in it, and it is a part of the Paramount policy of assuring successful local operation. In such cases the responsibility for management usually falls upon one who may be fairly described as in a position like that of a managing partner, active in preserving his own interests, knowing the demands of the local community, interested primarily in local operation. Such operators conduct their business with little regard and almost no consultation with Paramount and the policies of local exhibition, including the negotiation of license contracts, are in such cases left entirely to the managing partner. Of course, Paramount pictures are usually shown in such theatres, and the favorable opportunity to show Paramount pictures was undoubtedly a consideration in Paramount's acquisition of an interest. But such local managers, deeply concerned with their own economic interests, would have no motive for participating in a combination or conspiracy with other producers of which Paramount and not they would be the beneficiaries. Indeed, their separate

(100) interests are quite inconsistent with any such combination or conspiracy. Nor are they interested in the operation of other theatres in other areas in which Paramount may have an interest. It is apparent, therefore, that such theatres cannot be lumped together with other Paramount theatres in which still others have interests, let alone lumping them with theatres of other defendants. We shall show that, in fact, there is no relationship between the licensing policy of theatres associated with Paramount in different sections of the country, that only the business interests of the theatres and their actual operators dictate the degree to which and the terms on which the pictures of other producers are licensed. There is no discernible nor possible pattern of conduct which can give rise to an inference of combination or conspiracy among the defendants.

Of course, in such cases, Paramount maintains a general fiscal supervision of the companies in which it has less

than a majority interest, through its theatre department. The New York office of Paramount has a statistical department, an auditing department, tax department, real estate and insurance departments, and other similar departments unrelated to management of the theatres. In some cases an executive in the theatre department is an officer or a director of the theatre-operating company or an intermediate holding company. They, of course, sometimes attend meetings (101)

of stockholders and directors. But their function is not one of intimate control of management. It is one of advice and such financial supervision as is necessary to protect Paramount's investment against loss. While the theatre department often receives summaries of exhibition contracts which the local operators have made for the films of other distributors, it does not receive the contracts as such. Information regarding the contracts of such theatres with other distributors is confidential and is not made available to the distribution department. This is because of the keen rivalry between the departments in the Paramount organization.

The Government says it is not concerned with and will offer no proof of how any defendant interested in theatres came to have any of its present interests, and seeks this decree of divorce without regard to any elements in that history. We think it important to indicate in a general way how the present business units organized. When that history is examined, it will be found that Paramount's interests in theatres were acquired in competition and for competitive purposes, and that throughout its history it has been, as it is today, engaged in most vigorous competition with its co-defendants all along the line.

The Paramount organization was not planned or created in advance; it is a natural business growth considered essential to business success, developing as a result of the various (102)

vicissitudes through which the business has passed.

I am going to save your Honors, if you will permit me to, the reading of a number of pages of the manuscript, which I would like to hand to the reporter, so it may be in the record, which deals with the early history of the Paramount Company and traces the development of feature pictures in the United States. Mr. Adolph Zukor, who at one time was president of Paramount and who is now chairman of the board, was the father of feature pictures in this country, and I have devoted a few pages here, which I will be glad to save your Honors listening to at this time, by putting them in the record, as to the development of feature pictures and the early history of Paramount, if I may have the Court's permission to hand four or five pages to the reporter. You will be able to take them in more painlessly at a later time.

(The matter referred to by Mr. Seymour is as follows:

In 1906, following early developments of "peep-shows" and nickelodeons by Edison and others, Mr. Adolph Zukor, former President and now Chairman of the Board of Paramount, and the organizer and creator of its predecessor, acquired his first interest in a theatre in association with William A. Brady. Brady and Zukor acquired a store on the south of Union Square and constructed a Pullman car (103)

inside, charged admission to people who came in and were privileged to sit in the observation end of the car and observe on a screen, about 20 feet beyond, pictures of passing scenery as if they were moving through the country. Zukor tried to interest producers in supplying similar travelogues, but they were too busy making inferior product. By 1907 or 1908, the so-called "chase" pictures had lost their appeal.

At that time Zukor and Brady had leases on about 14 nickelodeons and faced the necessity of going out of business or procuring better pictures. As none were available in this country, but better ones were made in Europe, Zukor procured from abroad a three-reel picture consisting of a hand-colored film of the Passion Play at Oberammergau. This film was exhibited in Newark and ran successfully for four

months, and thereafter ran in the Zukor and Brady theatres in New York. As a result of this experience, Mr. Zukor was persuaded that people would be interested in novels and plays and stories on the screen. He had no experience in production and no thought of producing pictures, but when he approached the American producers he could not arouse any enthusiasm. They uniformly expressed the belief that people would never sit through pictures that ran three, four or five reels.

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After futile efforts to persuade them that they were wrong, Zukor then went into the vaudeville theatres where chase pictures were then used to empty the theatres. As a vaudeville operator, he was associated with Mr. Loew, who at that time had a number of vaudeville theatres. In 1910, the Zukor and Brady theatres and the Loew theatres were merged in what was then known as Loew Enterprises, in which Mr. Zukor obtained a stock interest. He then devoted himself to a study of motion pictures, traveling through Europe, and observing audiences to verify his judgment of their interest in long, better-quality film.

In 1911, he determined to present successful plays in motion pictures. Sarah Bernhardt had in the meantime appeared in Paris in a stage play called "Queen Elizabeth", and Zukor was informed that she would be willing to sell the picture rights for \$35,000. Although the price was considered almost prohibitive, Zukor paid it, procured the picture, and booked it for exhibition. He had to book it in a legitimate theatre because there were no ways of distribution then which were not monopolized. He booked it at a theatre in New York and one in Chicago. It was a great success. The first successful feature picture in America. At that time what there was of this industry was completely monopolized by the Motion Picture Patents Company, a patent pool, and its affiliate General Film Company, neither of which had any

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connection with the present defendants or their predecessors.

The system was that there was a patent pool which licensed the patented projector, refusing to license unless films

were also licensed from it. There was a group of all the producers at that time operating, and there was a distributing company, the General Film Company, and the arrangements were such that no one could produce a picture, no one could distribute it, and no one could license it because of these illegal tying clauses to each step in that process by which every exhibitor who dealt with the General Film Company was restricted to the exhibition of those pictures alone which were distributed by the distributing company. This monopoly was so secure that it resisted all initiative in the improvement of pictures. It refused to distribute the new and superior films introduced by Zukor. Thereupon Zukor set out to improve the art against the resistance of monopoly and he broke it down, and eventually they could not do without his pictures. His first act was to organize a company which is a predecessor of the defendant Paramount. A brief history of this company shows that on June 1, 1912, Famous Players Film Company was organized by Mr. Zukor in association with Daniel Frohman and Edward S. Porter. Frohman was a well known producer and Porter was a director of motion pictures who had been associated with Edison. The plan of this company was to present successful plays with famous stars on the screen. The first picture was "The (106)

Prisoner of Zenda" with J. K. Hackett. General Film Company at first declined to license this picture, but when it was shown at the Lyceum and was a great success, General Film Company changed its tune and sought to license the picture. The license was granted which permitted such exhibition by exhibitors using patented projectors and Zukor distributed the picture not through the General Film Company but through states rights' distributors for a flat sum in each territory. Thus you see the breaking of a monopoly by the sheer quality of the product.

The company continued to make pictures in which were starred James O'Neill, Mrs. Fiske, Mary Pickford, William Farnum and John Barrymore, among others. These pictures

were all distributed in the same manner through state rights buyers. Several other companies followed his example and commenced production and distribution of similar pictures. The influence of the General Film Company was still present. Many exhibitors were fearful that the General Film Company would refuse to supply them with any pictures if they leased from other companies, and it was only by virtue of the policy of the new producers who had entered the field to supply a sufficient quantity of pictures to meet their customers' needs that the more progressive exhibitors were encouraged to break away from the General Film Company and contract for the better pictures which its competitors were offering. These companies were able to furnish a dependable supply of 52 pictures a year, which was only sufficient for a few theatres which ran the same picture for a week. A much larger group of theatres could only be won by better pictures if they could be supplied with two pictures a week, since their neighborhoods would not support the same picture for an entire week.

It became increasingly evident that a comprehensive and coordinated distributing organization was necessary.

In 1914 Paramount Pictures Corporation which was organized by State Right Distributors but was not connected with the present defendant or its predecessors, was organized as a distributing company because of dissatisfaction with existing methods. In May, 1914, this distributing company entered into individual contracts with Famous Players, the Lasky Company and the Boqworth Company for a five-year period whereby the distributing company distributed their product through the United States. Each of the producers was obligated to supply a specified number of pictures, in all totalling 80. It was contemplated that the distributor would make up the difference from other producers, so that there would be a full program of 104 a year by acquiring pictures elsewhere.

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On March 31, 1915, these contracts were extended for a period of 25 years, but there had been a considerable amount of friction between the producing companies and the distributing company. As a result and in order to bring about a closer union in the interests of the producer and distributor and to protect the interests of the former, Famous Players in 1916 agreed to purchase 50 per cent of the stock of the distributing company. As the business developed and particular stars obtained a large following, some of them refused to permit their pictures to become a part of the distributing program. The distributing Paramount organization required exhibitors to take all its product, good, bad or indifferent, and stars, such as Mary Pickford, were unwilling to make pictures to be distributed by Paramount because the method of leasing 52 or 104 pictures annually at a flat price per picture prevented payment to them measured by the box office receipts of their own pictures. The most prominent stars at that time were insisting upon a share in these receipts. Furthermore, they felt that their own dramatic performance if sold as an item of a program for which the exhibitor paid a flat sum per picture regardless of merit would be impaired in sales value.

To meet this situation, Famous Players organized Artcraft Pictures Corporation. Its object was to create a (109)

trade-mark denoting pictures of the highest grade which should be released to exhibitors without requiring them to take any other pictures. Among the Artcraft stars besides Mary Pickford were Douglas Fairbanks, William S. Hart, George M. Cohan and others.

About this time, Famous Players-Lasky was incorporated and acquired the stock of Famous Players Film Company, Jesse L. Lasky Feature Play Company and Bosworth, Inc. and its affiliate Morosco Photoplay Company. The reasons for the organization of this corporation were numerous. Its constituent units were not in competition with each other.

in the distribution of pictures but were severally under contract with Paramount Pictures Corporation to furnish the latter with a certain number of pictures a year. Each company was independently operated, whereas the best interests of the producers and distributors required that their activities should be coordinated to the end that pictures provided by them would as a whole constitute a diversified and balanced program.

On the artistic side, consolidation appeared to offer great possibilities by giving the directors, scenario writers, camera men, and others, a greater field of selection and a maximum use of the talent of each individual. The consolidation did not have the effect of lessening competition between the companies since they were not in competition.

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Famous Players purchased the remaining stock of Paramount Pictures Corporation, the distributing company, in 1916, and by early 1917 had acquired all of it. The companies were formally merged in December, 1917. During 1916, in addition to Paramount, there were many other companies engaged in distribution.)

Mr. Seymour: Now I am going to pass to the conditions which gave rise to the entry of Paramount into the exhibition business. From the very beginning of this industry the tendency to organize chains of theatres was prevalent. This movement developed greatly in 1910, 1911 and 1912, and was very general by 1919. Not only was there concentration of theatre interests in chains, but a number of theatre owners consolidated their purchases by entering into booking arrangements for a whole group of theatres. Thus we find that the concentration of theatre ownership through chains and booking arrangements antedated the acquisition of theatres by any of the defendants and it cannot be doubted that this method of theatre organization would have persisted even if the defendants had acquired no theatres or if they were now to dispose of them. There are now approximately 100 chains of theatres in the United States in which defend-

ants have no interest. Their existence is recognized in the Consent Decree. Nothing which happens in this court can affect these chains.

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When these consolidations and combinations of theatres were well established in all principal cities in 1917, First National Exhibitors Circuit, Inc. was formed. It was to enable Paramount's predecessor to survive this competition, that compelled Mr. Zukor to put it into the theatre business.

The First National organization was composed of 29 signatories, representing 23 distinct interests, which among themselves controlled the purchase of film by a very large number of the leading theatres throughout the United States.

The activities of this organization and its original franchise holders were not long limited to a combination for co-operative purchasing of pictures for exhibition in the best theatres in the principal key cities throughout the country and general distribution through exchanges located in these cities of the pictures so purchased. As a matter of fact, the First National group actually purchased but two finished pictures in the open market, soon finding that that method would not supply its theatres even when those pictures were combined with other state rights pictures. It would not supply these theatres who joined in this combination with a satisfactory program of good pictures on a reasonably definite schedule. This group, representing all of these theatre outlets, thereafter, within three months after its organiza-

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tion, began an aggressive program of negotiation for contracts with well-known stars and directors then in the employ of other producers for the exclusive production of numbers of pictures to be delivered in schedules extending over a period of years.

As Paramount pictures were then generally recognized to be the best on the market, its stars and directors had come to be best known. Accordingly, representatives of First National began to negotiate with most of these stars and direc-

tors notwithstanding their unexpired contracts with Famous Players-Lasky (Paramount's predecessor). The stars were told that they would make more money and have greater freedom if they formed their own distributing companies and distributed through First National. Offers of substantial financial assistance were made to them. Among the stars of Famous Players with whom such negotiations were had were Mary Pickford, Jack Pickford, Norma Talmadge, Tom Meighan, Cecil DeMille and Wallace Reid. Mary Pickford, Famous Players' greatest star and then the outstanding star in the industry, was enticed away by First National. Other stars were also taken away by fantastic inducements.

The purchase of pictures in the open market as well as the making of the contracts with stars and directors for the production of pictures was in each case submitted to a vote of the First National theatre owners who were franchise hold-
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ers, and the approval of two-thirds was required for purchase. When such approval was obtained all franchise holders were bound to take all the pictures purchased and to bear their proportionate share of the cost of production. The cost was distributed among the several franchise holders in proportions agreed upon the time of organization. Such franchise holders then had the right, within his territory to do what he saw fit with each picture. In practice each holder ran the pictures in his own theatres and then distributed them among other distributors in his territory who paid him for the privilege. So not only the member theatre owners of this group were bound to take all the pictures that the group produced, and to share the cost of them, but that was spread down through these leading theatre owners into the territories in which they individually operated, 23 of them covering the whole of the United States and the movement began to tie up not only the members of this group but to bring into it every other important theatre that they could get to take a sub-franchise. Eventually a central office was organized and the distributing offices of the group came

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under centralized control. A system was developed for making sub-franchises and requiring the sub-franchise to assume part of the cost.

In 1917 the First National distributed two pictures, in 1918, sixteen, and in 1919, twenty-five. Its various members (114)

had in their exchanges many additional pictures which when added to the First National pictures by the end of 1918, furnished a program of at least one picture a week and by 1919 the First National Company itself had announced that it had contracts indicating that with the aid of the outside pictures purchased by its several members, it would be able to distribute a program of approximately sixty pictures in 1920. The program was actually released by it. Its avowed intention was to distribute enough pictures to supply all the time of all the theatres of its members which changed their program once a week.

Many of the theatres owned by First National franchise holders had for a long time prior to 1918 exhibited a large number of Paramount pictures. While many of them continued, even after the organization of First National, to endeavor to purchase some Paramount pictures, substantially all the First National members gave preference to the First National pictures in which they had made a considerable investment. The natural result was the gradual cutting down of Paramount pictures in those theatres. This was furthered by vigorous, hostile attacks upon Mr. Zukor and Famous Players (Paramount's predecessor).

A few of the members while giving First National pictures preference continued to take a substantial number of Famous Players-Lasky pictures and paid reasonable prices (115)

therefor. Many others while continuing to take Paramount pictures insisted upon prices which Famous Players were not satisfied with and on which it could not make a profit. Others refused to accept the prices which Famous Players deemed fair, then failed to play the pictures contracted for

and ultimately boycotted them, actively engaging in propaganda to spread the boycott to all the pictures in their territories. Thus by 1919 Famous Players faced this situation: a group of owners of the best theatres in the large cities of the United States, many of whom had been its best customers, had combined together for cooperative buying and had expanded into an organization at first loosely knit, but rapidly growing more centralized, distributing throughout the United States a substantial number of pictures pursuant to a publicly announced policy and had threatened to distribute sufficient pictures to take the entire time of the former Paramount customers. The inevitable result was to exclude all Paramount pictures from their previous market in the first-run theatres owned or controlled by First National. In addition to the direct loss of revenue from rentals, the indirect loss of rentals of smaller theatres in surrounding territory, due to a failure of adequate exploitation, was inevitable unless Paramount took steps to protect its market.

Within a comparatively short period of time after its (116)

organization, the twenty-nine franchise holders of First National, subfranchised about 3,300 exhibitors controlling more than 4,000 theatres throughout the United States.

Mr. Zukor early saw this result and in 1917 endeavored to make a working arrangement with First National as a booking office to book cooperatively pictures in its several theatres, including Paramount pictures. He continued in this effort and endeavored to persuade First National to cease trying to steal his stars and directors. Not only had they taken away some, but they were destroying the morale of the rest, whose demands for higher salaries very much increased the cost of the pictures and therefore increased film rentals which had to be secured. These efforts were unavailing. First National boasted publicly that they had Famous Players-Lasky whipped and up a tree. Mr. Zukor was opposed to Famous Players expanding into the exhibition field, feeling

that it was better for each element of the industry to specialize, but he and his directors nevertheless saw that unless the exhibitors took a similar view, Famous Players would be compelled against its will to enter the field of exhibition as a means of self-preservation. At this time outside of small interests in two theatres in Ohio, Paramount had no interest in theatres. But the First National movement was growing, the propaganda against Famous Players-Lasky (Paramount) was growing, and faced with this situation Paramount be-

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tween 1919 and 1923 acquired an interest in theatres and theatre circuits involving some 300 theatres in order to secure an outlet for its pictures. The purpose of this acquisition was not to monopolize, but to survive in the business of producing and distributing motion pictures. Thus the very integration now attacked had its origin in competition and not in monopoly.

I am going to be through in about five minutes.

In 1921 the Federal Trade Commission instituted proceedings against Famous Players (the predecessor of Paramount) and its affiliates and officers, charging a conspiracy to unduly hinder competition in production, distribution and exhibition of motion picture films and to control, dominate and monopolize the motion picture industry. The petition sought an order from the Commission directing the Famous Players group to divest themselves of all interests either direct or indirect which they might have in theatres or to divest themselves of interests in producing companies. After an investigation which continued for over four years and upon a record consisting of over 17,000 pages, the Commission issued an order directing the respondents to cease and desist from acquiring theatres and also prohibiting certain trade practices. The Commission filed a petition for enforcement, but withdrew its complaint as to theatre acquisition and in considering that case the Circuit Court of Appeals in

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this circuit held:

"1. That there is free competition among producers and distributors for the distribution and marketing of their pictures;

"2. There is a lack of monopolization by the respondent, and in fact lack of ability to achieve a monopoly;

"3. There is a state of free competition in the industry sufficiently shown to negative the finding of the Commission that the respondent dominates the industry."

Thus it has been judicially determined in this circuit that at least as late as January 1, 1926 Paramount's predecessor was not guilty of the matters principally charged in this suit. Following this initial acquisition Paramount's predecessor acquired other interests often in competition with other defendants or independent chains. The purpose of these acquisitions was to assure further outlets for its product to enable it more effectively to compete with other producer-exhibitor defendants, to prevent its being frozen out from the acquisition of theatres by its competitors and to furnish an additional source of revenue for the stockholders. There was no purpose to monopolize, there was no monopoly and nowhere is there evidence that as a result of this acquisition a conspiracy or combination to monopolize was created. (119)

The acquisitions made down to the year 1930 were considered by Judge Caffey in the Quittner case, in this District, involving a charge of national conspiracy to monopolize, and he there found, and stated in his oral opinion dismissing the complaint, that there was a complete absence of evidence of conspiracy to monopolize and ample evidence of intense competition. Evidence of such conspiracy or combination is equally lacking now, and it will be abundantly clear that there is intense competition in this industry.

Under its former name Paramount Publix Corporation, Paramount was adjudicated a bankrupt in this court early

in 1933. Its affairs were placed in the hands of trustees in bankruptcy and thereafter upon the enactment of Section 77B a petition was filed under that section and reorganization proceedings were instituted. The corporation was finally reorganized under the present name and its assets were turned back to it in June, 1935. Many of the theatres of the Paramount Publix Company were integrated and were also reorganized during this period and many of the theatres belonging to these theatre companies were dropped during the process of this reorganization. In such situations the trustees under the supervision of this court determined what action should be taken to protect the interests of Paramount in its theatres and such steps as were taken with the (120)

approval of the court after proper proceedings for their consideration by creditors and others interested. Since Paramount has emerged from the reorganization there have been some changes in the theatre holdings, none of which have resulted from any attempt to monopolize and the aggregate of which, through no stretch of the imagination, can be called monopoly.

It is Paramount's position that there is and has been no combination or conspiracy to monopolize, that the Government's proofs will fail completely to show law violation and that, at the end of the case, the court should find that Paramount and its competitors are free to continue the competition which has created so many public benefits. That result will continue to assure the public of increased improvements in pictures, any other would seriously prejudice Paramount's ability to continue to do so. There will be found to be no basis whatever for hamstringing Paramount in its competitive position or denying to it the opportunity to exhibit its pictures in its own theatres or to continue its interest in the theatres through which it is rendering the public distinctive service.

I must thank the Court for its great patience, and I am sorry I had to read and be so long about it.

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DEFENDANT LOEW'S OPENING.

Mr. Davis: If the Court please, may I inquire at what hour the Court is going to adjourn, so I may cut my cloth accordingly?

Judge Hand: Half-past four.

Mr. Davis: I appear in this case for Loew's, Inc. and for the subsidiary corporations who, by the bill of complaint, are identified with it. These are, chiefly, Marcus Loew Booking Agency, which is a 100 per cent owned corporation and a mere operating department and some 50-odd minor corporations which hold title to real estate, on which are situated theatres that the Loew's Incorporated owns and operates. It is a corporation organized under the laws of Delaware and has 22,600 stockholders, more or less, and something like thirteen or fourteen thousand employees.

So far as the major corporation knows, no officer and no stockholder owns any stock in any of the other corporations here at bar; nor, so far as Loew's, Inc. knows, do any of the officers or stockholders of the other corporations here at bar own any stock in Loew's. There are no directors in Loew's who are common to any of the other defendants at bar. There are no officers of Loew's who are common to any of the other defendants at bar. So far as corporate organization, ownership and identity are concerned, there is no contact whatever between Loew's and the other defendants at bar.

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For that defendant, I propose, without wearying the Court more than may be necessary, to state what I believe the charges the Government brings against us, and the answers to those charges which we will undertake to support by proof. I say the charges which I believe the Government brings against us. Ever since this suit was brought, there has been a constant effort on the part of these defendants, by motion, by interrogatories, by argument, to get from the Government a clear-cut statement of what it was we were

charged with and what the Government believed we were guilty of. I say that has been continuous. It has. His Honor, Judge Goddard, knows that we have pounded on the door of the Court more than once on that subject.

Therefore, I confess I have a feeling of disappointment that my brother Wright, in his opening statement this morning, did not help us to clarify these issues by a succinct statement of just why the Government thought the Act had been violated. Instead, he threw himself back upon the trial brief after reading and re-reading the trial brief, through.

Confessing my own obtuseness, I find myself still in doubt as to just what the concrete issue is that the Government wishes to lay before your Honors.

I shall have something more to say about that trial brief (123)

in a moment, but it is perfectly obvious that certain, fundamental fallacies underlie the Government's position, and the first is the one referred to by my brother Seymour. The Government builds up a statistical monopoly here by a process of addition, and having added together all the corporations that all these defendants own, it says, "Look what a large block of corporations there are embraced in this monopoly!" Having added together all the revenues that all of these corporations receive from all their activities, he says, "Look what a preponderating monopoly there is in this industry!"

The same basis of addition could build up a charge of absolute monopoly in any industry, if you took all of its units and brought them into your equation.

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If United States Steel, the Bethlehem, the Republic, Youngstown, the National and whatever, were all added together as to output, as to revenue, as to customers, you could prove by that simple process of addition that they had a one hundred per cent monopoly in the United States. If they were combined, that testimony might be relevant. But if they are wholly independent and separate units, that total

means nothing on earth. It is only fit for statistics in the National Year Book to prove what the national output is.

I object also to the implication which the Government attaches to the word "independent." It speaks throughout its brief, its statistics and its argument, of the five defendants here at the bar and the independents. Now we contend that if the word "independent" is to be applied according to its meaning, every one of these defendants is just as much an independent as Joe Zilch, who owns a theatre down the street; and unless the word "independent" is understood in a purely symbolical and hypothetical sense, as indicating those who are outside of the bill of complaint and those who are within it, we shall object to its use.

I object also to the use of the word "affiliates" in the Government's brief and in much of its statistical tables. Corporations are spoken of as affiliates. Affiliates of whom? Affiliates of Warner's? Affiliates of Loew's? Affiliates of (125)

Paramount's? We are not told that. If they had contact with anyone of the corporations named in the bill of complaint either by ownership, either by contract, either by license, they are identified as affiliates not of the affliator, if I may coin that word, but of this entire group at which the complaint is aimed.

And before I get to the trial brief, I want to say one more thing. I really do not understand the easy and somewhat cavalier method in which counsel for the Government brush aside the consent decree in this case as a mere three-year experiment which has outlived its life, and which he would lead the court to believe is no longer a subsisting order of this tribunal. Now nothing could be more mistaken than that. In June 1940 we began the trial of this case. It was opened in solemn form, and I fancy that most of the counsel at this table will run the risk of repeating some of the things they said on that occasion.

In November 1940, after a long and protracted and very diligent conference between counsel for the defendants and

counsel for the Government, a consent decree was offered to the court. It was signed. It became operative and is just as alive today as it was when his Honor, Judge Goddard, put the judicial signature on it. It is going to crop up again (126)

in this case from time to time; and perhaps digressing from the discussion of my particular and individual client would not be a waste of time, if we stop and think what that consent decree had in it, I will make that summary just as brief as I can:

It had 23 paragraphs. The first was a declaration of jurisdiction. The second was an announcement of the consent of the parties. The third was a paragraph requiring trade showing which was to be inoperative, that requirement, if there were no decree against the three without—what we without reflection call the minors—within a specified time; for the minors feeling themselves wrapped around with a robe of perfect innocence that no charge could penetrate, refused to consent to anything, and left the five majors who are represented up and down this table to make a consent decree which put upon them certain requirements as to the conduct of their business, not shared by any other person in the industry. We consented to that, and we did so for the obvious reason that we wanted peace. We wanted peace from the Government if we could get it; and we also wanted peace from the multitude of claimants in these seventeen thousand other theatres who were bombarding us with their complaints of mistreatment of this sort and of that. (127)

We wanted peace from them by giving them a tribunal to which they might resort without any other formality or delay attendant upon a trial in court. I venture to say that no decree was ever negotiated with a more earnest effort on the part of the parties to it to solve the difficulties attendant upon the industry and to quiet the complaints by which it was beset.

Clause three, requiring a trade showing of films expired when there was no decree against the non-assenting defendants.

Block booking, say more than five features at one time, expired for the same reason, there having been no decree against the minors within the time specified.

Section 4, forbidding the forcing of shorts, so-called—and I take it your Honors at this time are sufficiently expert in the industry to know what that means—that is still in force. We cannot force the purchaser of our films to take undesired shorts, and any contract to that effect is arbitrable.

Section 5 of the decree forbids overall contracts which cover a territory larger than the individual exchange by which they are negotiated. Each of these producing companies has exchanges throughout the country who are really their sales agents. We have 32 such in Loew's, Inc., and this provision makes it mandatory that contracts made by those exchanges shall not run outside their territorial limits.

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The obvious effort was to forbid a nation-wide sale of film. That is still in force.

Clause 6 of the consent decree commands the defendants to sell to anybody, everybody, any applicant, on some run. We can no longer say to a theatre, "We won't sell you at all." Some run on the film we must give him. That is still in force. And if we decline to offer him the run to which he might fairly aspire that is an arbitrable question.

Section 7 of the decree deals with offensive films and gives the purchaser the right to return them if they are found to be offensive to public morals or taste in the locality in which they are exhibited. That is still in force.

The provision for the arbitration of clearance in paragraph 8 is still in force, and the declaration of this court stands today as firmly as when it was first given, that clearance reasonable as to time and area is essential in the distribution and exhibition of motion pictures. What is reasonable as to time and area is made arbitrable, but the practice of clearance, I respectfully submit, is the law of this case.

Section 9 of the consent decree forbids the arbitrary refusal to deliver films in order to expose the unfavored purchaser to discrimination, and the refusal is made arbitrable. (129)

Section 10 of the decree forbids the refusal of a requested run unless after arbitration it is shown to be properly requested.

Section 11 forbids new acquisitions of theatres within the three-year limit, which has expired by lapse of time.

Section 12 provides for a conditional release of these earlier clauses as to trade showing and block booking if prior to June 1, 1942. Universal, United Artists and Columbia are not brought under the same restriction.

Section 13 declares that the operation of the decree covers only the Continental United States.

Section 14 preserves to the producer the right to road show his pictures.

Section 15 declares that the decree shall not relate to franchises entered into prior to June 6, 1940, all of which have practically expired now by lapse of time.

Section 16 provides that nothing shall be a violation of the decree unless a refusal to arbitrate or perform.

Section 17 preserves to the defendants the right to license their own theatres for the exhibition of any or all pictures which it may distribute.

Section 18 gives to the Department of Justice the fullest right to inspect the books, records, correspondence and so forth of the defendants, and to interview their officers and (130)

employees. The learned Attorney General was kind enough to praise us for the cooperation we have given the Government in its preparation of this case. No request which they have made for information has ever been refused, and at considerable cost and expense to ourselves. We have assembled all of the statistical information they might desire. But perhaps we should not assume too holy an attitude in that respect, for we have signed a decree which gives

the Department of Justice entire right at its discretion to demand just that thing.

Section 19 of the decree gives us the right, unhampered, to select our own customers and make our own trades with them. That is still in force.

Section 21 of the decree is a self-denying ordinance by counsel for the Government and on its behalf which provides that for the period of three years it will bring no action for divorcement of the defendants' theatres. That is not a limitation on the life of the decree. It does not make it a purely experimental decree to operate for three years and no more. It is a self-denying ordinance by the Government for that length of time, and obviously the time has expired.

Section 22 sets up an arbitration system with complete machinery, an administrator, local arbitrators, a court of appeals for arbitration, which the Government to the contrary notwithstanding, we believe—and in that we think we would be supported if there were any way to canvass (131)

them—the vast majority of the industry we believe, have been a helpful and a wise and a prudent solution of the individual problems with which this industry is surrounded.

And then finally we come to Section 23, where jurisdiction is retained enabling any of the parties to this decree to apply to the court at any time more than three years after the date of its entry for any modification thereof.

Now manifestly the Government does not choose to take that route. Manifestly it does not want to endeavor to improve this decree. Manifestly it does not want to inquire what imperfections, if any, are to be found in the machinery it sets up. Not at all. The Government has a hobby here and it is determined to ride it to the end, no matter what may be the effect upon the industry; and with great respect, no matter what distortion of fact may be necessary to support it. The Government's hobby is that a cure-all for all the troubles with which this industry has been afflicted is to cut off production of films from their exhibition, and when that pana-

cea has been applied, then peace is to reign. And the 17,000 theatres throughout the United States are going to find (132)

themselves treated with such equal justice that there will be nothing left to complain about, and theatres A, B and C on the same street will cheerfully accept whatever they are able to bargain with the defendants for, and there will be no longer a complaints that theatre A gets the film before theatre C.

Well, I don't know of any similar instance, if your Honors please, where a Sherman Act case has been brought against a whole industry with a blunderbuss charge that everything is so wrong that the structure of the industry, as my brother Wright says, must be compulsorily altered.

In the steel industry, if you please, to go back to that for an illustration, the United States Steel Company may produce as much as it pleases. It must not be permitted to have its own showrooms and sell. Henry Ford may pour out automobiles as fast as his striking workmen will permit, but he must not have his own showrooms and he must not make his own retail sales. All that must be committed to somebody else, otherwise you would have a monopolization in the industry.

Loew's. Incorporated may turn out, as it believes it does—and I suppose all of our clients have the same feeling—the best films that are produced in the United States. They cost us about \$1,700,000 now on the average to produce. But it (133)

must not show them. It must take that film and announce that on such a day this film is going to be ready for public exhibition. I don't know whether my brother wants competitive bids for it; I don't know whether he wants it sent to every city in the country so that everybody may exhibit it at the same time; but the one thing that Loew's must not do is to show that film in its own theatres.

And the second thing which is almost equally reprehensible by the Government's standard is that it must not

permit any of these other defendants to show it in their theatres; and about that I want to have something to say in a moment. That is the panacea, the mustard plaster, if I may become colloquial, that the Government wants to apply to this industry, in a sincere effort—and we give them credit for sincerity—in a sincere effort to protect the country against monopolistic practices.

Now I say we have got to go back to the trial brief for our idea of the Government's theory. As I read that trial brief—and I have read it and reread it and read it again, in an earnest effort primarily on my own behalf, then on behalf of my clients, and now, I hope, on behalf of the court, to see if I could get at the skeleton of this thing. What were the specific issues concerning which the Government had accumulated this vast amount of literature and statistics with (134)

which it now promises to regale the court? They say in opening that the main question—and they say this again in closing—Can the requirements of the Sherman Act as applied to the producer-exhibitor defendants be satisfied without divesting them of their theatres?

Now what are the respects in which it goes on to describe the Sherman Act as violated? The first appears early in their brief. A concerted monopolization by the five majors and the three minors which justifies divorcement. Now the word of course there that is material is the word "concerted." It is concert of action at which the Sherman Law aims. It is combinations, contracts, conspiracies, at which the Sherman Law is aimed, and if we are going to prove a concerted monopolization it must be not a matter of accident but a matter of will and intent participated in by these accused defendants.

We deny it. We say there is no such concerted monopolization; we say there is not an industry in which the units are more at large or freer, or less subject one to the will of the other; that the Government on that point must utterly

fail. Even if it prevailed there is still a vast gulf between their complaint of monopolization and their proposed remedy of divorcement between exhibition and production. (135)

They must show at some stage of the case that production on the one hand, exhibition on the other, and the two combined are the source of the monopoly which, in the second place, they must prove to be the result of some concerted action.

Now the next thing which I extract from this trial brief is the alleged existence of certain local monopolies. Having charged a concerted monopolization industry-wide and the country over, they then charge local monopolies. They say that these occur in 73 cities of over one hundred thousand population, and that in those 73 cities this monopolistic combine has taken to itself all of the first-run theatres with their large revenues. I pause a moment at that charge, because unless I am mistaken as to the future progress of this case, it is just there that the largest draft is going to be drawn upon your Honors' time and patience. If these monopolies are to be considered one by one, it is as one by one that they must be proven, for the proof of a local monopoly in Bangor, Maine, affords no room for inference, much less proof, of the existence of one in San Antonio, Texas; and therefore we shall demand that instead of confronting us with a mere catalogue of towns, the situation in each of these towns shall be inquired into to determine whether the Government's statistics which are confined to these five defendants, do or do (136)

not exhibit a monopoly in that area.

Let me say in passing, as far as Loew's Incorporated is concerned, we have exhibition theatres in but 26 of these 73 cities, and in not one of those cities in which we are exhibiting do we exhibit without active competition. In twelve of the cities out of our twenty-six we are confronted by first-run theatres from anywhere from one to three of our co-defendants, and in 14 of them we are confronted by first-run

theatres owned by wholly independent—meaning *extra* suit—owners.

Now, how can it be said that we monopolize 73 cities? And if we are going to be charged with that, we shall ask the Government to come forward city by city and prove it.

Then we come to the question of trade practices. That is the third thing which I extract from this trial brief. Trade practices—and I have catalogued 7 of them which are mentioned in the brief. They object to our license agreements, and call attention to the fact that in many of their clauses—the clauses in the license agreements—are with many of the corporations very much the same. So they are. I don't know of any industry which does not show a marked tendency to formalize and standardize particular contracts. Indeed, in some industries it is commanded by law, as in the insurance (137)

industry, railroad shipments, and there is hardly an industry where the tendency—and I think it may be ascribed either to the astuteness or to the indolence of their lawyers, I don't know which—but for one reason or another they have a tendency to standardize forms. But when your Honors come to look at those of these defendants, you will find that in material respects there is no harmony between them at all.

Then the objection is that we fixed prices. Of course we do. We have something to sell. I go into my shoemaker's and as the price of a pair of shoes, and it is five dollars. He has fixed the price on that pair of shoes and I pay it. It is a price-fixing transaction, and, indeed, I know of no commercial transaction which is engaged in for profit and gain that has not an element of price in it. And so as copyright owners we say to these licensees, "We expect to receive such a percentage of your gross receipts, and because we expect to take our profit out of your gross receipts, we want some sort of a governor as to the way in which those gross receipts shall be earned and computed." We have a perfect right to say, "We will take so much of the gross receipts provided it is based on a charge of 75 cents per head of the

people who come into the theatre." And on that we are willing to stand with the Government in dispute and contro-
(138)

versy until—well, we know what the longest time is. That is the time to which I was referring.

Now they next object to the practice of first-runs, and they say that that is an evil. The value of the films, says the Government's trial brief, inevitably decreases in proportion to its lateness. One would think so. It is not at all surprising. There is more money made in the first-run theatre than there is in the tenth, because human nature has that indescribable curiosity that makes it want to see something as soon as it is out, and before anybody else has shown it. But I wonder if my friend has forgotten the original complaint, not the amended complaint, but the original complaint filed by the Government in this action. Let me read paragraph 120 on page 61 of that complaint:

"Metropolitan first-run theatres, sometimes referred to in the industry as metropolitan de luxe theatres, supply a market for motion pictures which is of vital importance to their profitable exhibition and subsequent exploitation. By their exhibition in these theatres, coupled with the various forms of advertising that accompany such exhibition, such theatres promote and control the value of pictures to subsequent run exhibitors. The owners of subsequent run theatres as well as the public are thereby made conscious of the existence of particular motion pictures. The reaction of
(139)

audiences to the exhibition of pictures in metropolitan de luxe theatres is largely determinative on the popularity and success of pictures on subsequent run. Furthermore, a large part of the gross revenue from the exhibition of a picture is derived from the first-run exhibition in metropolitan de luxe theatres."

And so say we all of us.

Clearance I have touched on. Minimum admission prices I have touched on; and the price-fixing I have alluded to.

Now they say there are certain interparty agreements. To show you the sort of—it is very hard for me to pare down my vocabulary to the limits of parliamentary etiquette—to show you the sort of shall we say facts and figures which are presented by my friend's schedules in his trial brief: I am on the proposition now that there are certain interparty agreements, that these five have grouped together and bound themselves one to another by agreement which destroys the freedom of action in the motion picture field. And in the Government's trial brief, page 17, there are three pages, or is it four, devoted to a catalogue of towns in which some of these malicious defendants had licensed films to each other. It bears the flaming legend: "The division of major first-run (140)

films during the 1943-1944 season among the theatres of the producer-exhibitor defendants and independents in the 73 cities with over a hundred thousand population in which the defendants are charged with monopolizing theatre operations is shown in the following table."

Well, I am not going to go over this. I just want to start with the top line. New York, New York. When we get to Loew's, Loew's is charged with a division of major first-run films in New York with Loew's, itself, and Paramount and an independent. Now, if Loew's had made a bargain with Paramount and an independent that nobody else should get any of its films, and it would whack up on the even, that would be one thing. But when we get to the facts of that particular entry, the division with Paramount, listed, solemnly listed, here as a division of films and evidentiary of master agreements, is one single film of Loew's leased to the Paramount Theatre in the past ten years.

Now is it any wonder that we want to look at these tables our friend is presenting with so much aplomb and so much assurance?

And then they close with the assertion which brings me to the last thing I want to say, that all defendants are parties to a general price-fixing combination, which, of

course, we deny, and that each producer-defendant is an illegal monopoly *per se*. (141)

Well, that puts us to our trumps. The Government having failed hypothetically to prove that there is any contract between us, then proceeds to attack us on the theory of divide and conquer, and hang us one by one. Well, if we are to be hung one by one, and are to be tested, each one of us as a monopoly *per se*, then it does impose upon the defendants, as your Honors can see, a very considerable responsibility to detail their history, to describe their practices, to exhibit their assets and to show just what they have individually done. I regret to say that is going to take time. We might perhaps stand on the proposition that the Government could not prove it. It may be at some stage of the case we will urge that proposition on your Honors. But if we are not successful in our initial approach, it stands to reason, of course, that we will take no chances, and your Honors may be confronted by a good deal of proof on that subject.

What will it show as to Loew's, in brief? And I am not going into detail. It will show that it sprang from Marcus Loew's Penny Arcades in New York which began in 1903. It was not until 1920 that it went into the making of pictures, when it bought the Metro Corporation. By common consent, the corporation was making very bad pictures. Then it bought the Goldwyn Corporation and the Mayer in- (142)

terests. It now conducts its own studios in Culver City, California.

How many theatres does it own? Remember that the primary charge here is a monopolization of first-run theatres. There are in the United States, according to the last figures from the Government's trial brief, exactly 17,640 motion picture theatres. Loew's owns 129 the country over. The greatest concentration of ownership is in the City of New York where it owns sixty theatres. The historical result of the origin of Loew's was when Marcus Loew began buying up derelict legitimate theatres, and by the time he went into production

had 56; and I might say in passing we have fewer theatres today than we had when this suit began. We own 129 theatres. Sixty of them are in New York City, quite a large group. How does it compare with the total of the theatres in New York City? There are in New York City 658 motion picture theatres. And if your Honors do not believe that there is competition in motion pictures in New York City and in the motion picture business, I must respectfully invite you to imitate the late and beloved John Finley and take a voyage on foot around the Island, then I think you will answer by perversion of the Christopher Wren motto, "Si quaeris testimonium circumspice."

I was amazed to hear my friend say that Loew's and RKO (143)

monopolize the first-run pictures in New York. That was certainly an inadvertence. He could not have meant that.

Mr. Wright: I think what I said was prior, not first.

Mr. Davis: "Prior to what?"

Mr. Wright: I think the word I used was prior rather than first.

Mr. Davis: All right, make it prior. I will accept prior. I do not stuggle at the adjective at all: Go up Broadway some nights when the lights are bright. What do you see on this matter of monopolization? You will see burning brightly the lights at Loew's Capital, Loew's Criterion, at RKO's Palace, at Fox's Roxy and Rivoli in which it owns an interest, at Paramount's large Paramount, and a share in Rivoli; at Warner's Hollywood and Strand; at the Rockefeller Music Hall; at the Globe, the Gotham, the Victoria, the Rialto, the Ambassador, the Winter Garden, and the Republic, owned by so-called independents, and every one of them first-run theatres on Broadway. And if your Honors are willing to accept the theory that there is no competition between them, then I can only say that you would not agree with the ordinary Broadway visitor. Out of that sixteen, Loew's owns two. Two out of the sixteen. Yet we are charged with a

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monopoly in the first-run theatre business in the City of New York.

How about production? According to the Government's trial brief, seven of these defendants, Universal not being yet tabulated, produced in 1943 and 1944 211 feature pictures.

Loew's produced 33 out of that 211, or something like ten per cent. I don't know how much the figures of Universal would deflect that.

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I have noted the local monopoly, and I shan't repeat what I said there about joint ownerships. There are 11 theatres in Buffalo, in which we own $43\frac{1}{3}$ per cent interest. We took it in payment for an overdue debt for films. There was one in New Orleans, in which we own only $66\frac{2}{3}$ per cent, and one in Denver, in which we have 50 per cent. Those are our joint ownerships the country over. I haven't in my note before me the name of the owner of the remaining interest. That is what is charged to us, joint ownership of theatres.

If your Honors please, I could go on and talk at greater length.

What is the nexus between the Government's complaint and its proposed remedy? On what does it rely to prove the sort of combination and conspiracy that the statute denounces? There is but one bond among these defendants, and that the bond of a common industry and nothing more. There is no contract between the so-called offensive trade practices; theatre ownerships, because if these theatres were owned, every one of them, by a single as yet unnamed individual, the same questions, distribution of films, clearance of films, first run of films, of payment for films, would be exactly what they are today, and there is no possible contact between the revenues derived by one of the defendants and the revenues derived by any other or the revenue derived by the industry

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as a whole.

There is an old saying, "Common danger draws people together." We have seen that in the national and international political world. It is just as true in the judicial world. And, for the moment, there is a good deal of solidarity among these defendants, and sympathetic feeling, if you please, but there has not been, until this common danger descended upon them, and there won't be tomorrow or, at least, after what we hope will happen, a dismissal of the Government's complaint. It is only that sort of common interest that draws them together in the slightest, and we shall defy the Government to prove anything more than that in the nature of a combination, conspiracy or contract.

And I want to say one word more. I speak for Loew's now, and without any desire to disturb this harmony to which I have alluded or to cast any reflection upon any of my co-defendants, we shall demand to be judged for ourselves alone and we shall insist that the vague charges against us cannot be supported by attempted proof of actions by others unless the prerequisite of a combination between us is supplied. We don't want to make of this case simply an exercise in the law of evidence, and I hope we shall not be called upon to weary the Court with too many objections, but we shall, I respectfully submit, sternly insist on the observation of the rules, that testimony is admissible only against those to whom it applies.

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DEFENDANT TWENTIETH CENTURY-FOX FILM CORPORATION'S
OPENING

Mr. Caskey: If the Court please, I and my associates represent Twentieth Century-Fox Film Corporation and National Theatres Corporation.

Twentieth Century-Fox Film Corporation is engaged in the production and distribution of motion pictures. It is a publicly-owned corporation, its three classes of stock being traded in on the New York Stock Exchange. No individual or corporation owns any considerable percentage of any class of stock. So far as we know, no one interested in the ownership or management or profits of any other motion picture company has any interest in its stock. It has no

managing officials in common with any other company. Its board of directors is not interlocking with any other company's.

It has three principal subsidiaries: First, Movietone News makes and distributes the Fox Movietone News, two issues each week, and a number of short subjects; second is Roxy Theatre, Incorporated, of which it owns all the common stock and a minority of the preferred stock, and that corporation leases and operates the Roxy Theatre at 50th Street and Seventh Avenue, in New York; the third subsidiary is National Theatres Corporation, subsidiaries of which are engaged in operating motion picture theatres in the western states of the country. It has some seven principal operating subsidiaries and, all told, has approximately 550 operating theatres. Twentieth Century-Fox, as (147)

its name implies, was founded by William Fox. Mr. Fox had been engaged in the show business in New York since at least 1905. By 1912 the feature motion picture had been imported into the United States, when Mr. Zukor, with Louis Marcanton brought Sarah Bernhardt's picture to this company, the first four-reel picture.

By 1915 a substantial number of feature length motion pictures were being made in this country and Mr. Fox, who then had three relatively insignificant companies, decided to combine them into one. He had, first of all, a corporation called "Box Office Attractions Film Rentals." The significance of that title is that that exactly described what it was doing, it was renting motion pictures made by others to exhibitors in and around New York. He had a company called the William Fox Vaudeville Company, which was operating certain small and not deluxe vaudeville theatres in which motion pictures were also exhibited. And he had a company with quite an impressive name entitled, "Wonderful Plays and Players Company." He merged those three and formed Fox Film Corporation in 1915.

He sent an agent to Europe, where the art of making motion pictures was then more highly developed than it was

in this country, and that agent, Mr. J. A. Gordon Edwards came back to this country and produced the first Fox picture. It was entitled, "Life's Shop Window," and it cost \$4,500 to make. It was a success. And with the money (148)

which he made on that picture, he made a picture based upon Kipling's "Vampire."

So much for that point. The fact is that commencing in Judge Hand: I don't want to foreclose you, but—

Mr. Caskey: I will be glad—

Judge Hand: (Continuing)—but it seems to me you are getting genealogical, and I warned everybody against that. We are not going to listen to a lot of genealogy.

Mr. Caskey: No, but I think it is important to show; and the point I want to make is that in the early days of the motion picture industry, when Mr. Wright has said there was prosecution, charging monopoly, and has referred to the Motion Picture Patents case, I think it is important to show, as we will by evidence, that this company was not a part of any such combination but was an opponent and an enemy of that combination and that it succeeded in developing into one of the major companies in the country in a competitive manner, and that is the sole point, showing that in this period from 1915 to 1929, when the financial crisis stopped the expansion of the theatre acquisitions by these companies, that this company grew by intense competition.

So much for that point. The fact is that commencing in 1915 until the present time, the company has annually produced a considerable number of motion pictures, some of high quality but not all. Its annual production is approximately 10 per cent of the total number of pictures which are produced in any year. Its volume of revenue, which it derives (149)

from licensing those pictures, is probably somewhat higher than that percentage, but is not substantially greater.

It occupies a position in the industry which is substantially proportionate to the number of pictures which it produces.

As to its theatre ownings: As I have stated, in the very beginning Mr. William Fox had an interest in motion picture theatres, and in the early twenties, after the war, Fox Film Corporation commenced to acquire theatres. It had these few in New York. It next went to Philadelphia, then to Oakland, California, and then to Chicago, acquiring a few theatres in those four important cities of the United States, New York, Chicago, Philadelphia and Oakland.

In 1925 it purchased an interest in a California corporation, West Coast Theatres, which had been formed by others and which at that time was an existing group, or, if you will, circuit of theatres. I emphasize that because the acquisition at that time was of a minority interest in an already existing circuit of theatres.

In due course, Fox lost the theatres in Chicago because it could not successfully operate them and pay the rather large acquisition cost which had been insecurely financed.

When Fox acquired the minority interest in West Coast Theatres, the majority of the stockholders banded together (150)

prevent any of them selling out to Fox, lest it gain control. And their organization was a corporation known as Wesco Corporation.

In 1928 that corporation was acquired by Fox and it thereby acquired all of the stock of West Coast Theatres. During those years, in which it had only a minority position, and in which the majority had banded together, that circuit had grown so that it had approximately 200 theatres. From 1928 until Christmas of 1932 there were continued acquisitions of theatres in that group, so that by that time there were nearly 500 theatres in that circuit of theatres.

But by that time it had become extremely unprofitable. During the year 1932 the company lost seven million dollars, and, in addition, was forced to borrow several million dollars to meet capital charges. The result was that in 1933 each of the principal subsidiaries went into bankruptcy and there they remained until 1935.

In 1934 Wesco was reorganized. Its creditors decided to take stock for their indebtedness, and since there were only two, all the other claims having been acquired, Fox Film Corporation became a 42 per cent stockholder and the Chase National Bank the majority stockholder with 58 per cent.

And then Wesco changed its name to National Theatres Corporation, and proceeded to acquire from the various trustees in bankruptcy certain desirable assets either in the (151)

form of individual theatres or in the form of stock of operating companies.

Thus, from the summer of 1935 down until the summer of 1943, Fox had a 42 per cent interest and the Chase National Bank had the majority and controlling interest of 58 per cent, and all of the theatres in which Fox had any interest were in this corporate organization except the Roxy Theatre in New York, which was first acquired in 1937.

In 1943 Fox acquired all of the Chase Bank's interest and National became a wholly-owned subsidiary.

Inasmuch as the charge, as I read it, is not only a combination to monopolize, but a consummated monopoly as to the individual defendant, I think it important to discuss briefly, and it will be brief, the three divisions of the industry, and to show that this company has neither monopoly nor the capacity to achieve such a monopoly.

I think it conceded, although it was once otherwise charged, that standing alone the company has no monopoly of production. That it can have none becomes self-evident when you inquire into what is required to produce a motion picture.

Judge Hand: Well now, I thought,—perhaps I am wrong,—that was conceded—

Mr. Caskey: If it is conceded—

Judge Hand: (Continuing)—as you say:

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Mr. Caskey: If it is conceded on the record by Mr. Wright—

Judge Hand: —that the evil was in the combination which he says exists because of certain inferences that he draws from certain facts, I do not see now how this growth of Fox Film in 1920 or some other time—what it had years ago—has anything to do with the case. I always suspect the genealogical treatment as cumbersome and useless. I do not see what it has to do with the case as presented by anybody. If it does, why, of course, we want to hear anything you have to say, but we don't want to mix ourselves up and waste time in the case with this kind of remote stuff. It seems to me remote. Maybe I am wrong about it.

Mr. Caskey: Well, sir, we, of course, defer to your judgment. It has seemed to us that we should not leave the case simply in the posture of these statistics which have been compiled and make no reference to the circumstances under which these theatres have been acquired and the manner in which they are being operated and the effect of that operation upon the public interest.

As has already been pointed out, the combination, so far, is sought to be established, not by evidence, but by addition, and we are met with the proposition that we have combined to monopolize in New York City because we have the Roxy Theatre, which is in competition with Loew's Capitol and (153)

with Paramount's Paramount, and with Warner's Strand and RKO's Palace, as well as a large number of independently-owned theatres. It is to meet that suggestion, that the mere fact that there are in the United States these cities where two or more of us operate and that there are some situations in smaller communities where our theatres are either all of the first-run theatres or of all the theatres, that we thought it important to call to the Court's attention how it was that these theatre circuits came into existence; that they came into existence in the natural evolution of the business and not by any agreement, division of territory or even deliberate choice, but just as the business grew.

It is our understanding that if the acquisition of theatres was by a lawful means and if there has been no exclusion

from competition, then their ownership is not illegal, whether that owner be also engaged in other aspects of the motion picture business or not.

But coming now to the question of production, I understand now from Mr. Wright's muted words that it is conceded on the record that this company, at least, has itself no monopoly of production of motion pictures and no capacity to monopolize that business, and that that issue, therefore, is out of the case.

Certainly if that is true, if, as far as production is concerned, there is no claim of individual monopoly, it must be (154)

true as to the distribution of motion pictures.

As it has been explained to you, motion pictures are distributed in the sense that the positive prints, which are shown in the theatres, are kept in offices located in the principal cities of the country, sent to the exhibitor and returned. The facilities are readily available to anyone. There is nothing peculiar about them. The exchange itself is merely an office, like any other industrial corporation would have. There are in this country 11 corporations, eight of which are defendants, which have such a system of national distribution.

In the distribution of motion pictures, Twentieth Century-Fox serves more than 13,000 theatres in the United States. There are various statistics given as to the number of operating theatres, fluctuating somewhere between 16,500 and 17,500. Of those, at least 13,000 regularly show pictures made by this defendant, and not more than 550 of those 13,000 are theatres in which it has any financial interest.

The word "integration" has been used in argument today, but the fact is that 90 per cent of the people who go to motion picture theatres to see a Fox picture, see it in a theatre which is not owned or operated by any Fox interest. There is no vertical integration, as that phrase is sometimes used. There is, however, and only that, the ownership of these 550 theatres. In these 73 cities which are listed, Fox

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has a theatre in only 15. In one City, Detroit, it has only one theatre. It has all the first-run theatres in only one of these 73 cities, and that is in Wichita, Kansas, which is getting pretty far down the list. It does not have all the theatres, of course, in any of the cities. In these 14 cities in which it has theatres, first-run, it is in direct and active competition. In some of those cities that competition is from others of these defendants. In others, the competition is from some one or more of these defendants and an independent theatre operator. The situation in New York has been described. It follows the pattern throughout the country. For example, in Kansas City. Fox has a theatre, first-run—two theatres, first-run—one a little one and one a big one. Loew's has a theatre. Paramount has a theatre in which it has an interest. RKO has a theatre in which it has an interest. Those theatres directly compete with each other for the patronage of the people in Kansas City and surrounding country. Each tries to get the person who wants to go to the movie to come to its theatre and that, as we understand it, is the essence of competition.

There was handed to your Honors this morning a chart—the copy of which I have has a 25 in the upper righthand corner—showing the record of exhibition of "Road to Glory" by Twentieth Century-Fox in Kansas City. I think it typical of the method of distribution of motion pictures in that city.

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The first thing that is to be noted is that there are 30 theatres listed on the chart—this one had 25 in ink—there are 30 theatres in Kansas City which played the picture "Road to Glory". The last exhibition, in the National Theatre, was the identical picture shown in the first exhibition at the Uptown theatre. I call your Honor's attention to the progression of the picture through the town. At the Uptown, and it is called the Uptown, because it is not in the business part of Kansas City, but is out at 35th and

Broadway, the picture paid a film rental of \$1,600 and the public paid 40 cents to see the picture. Five weeks later the picture played for two days in the Plaza Theatre. The Plaza Theatre is one of the outstanding theatres in America. And then it played for five days in the Apollo Theatre and the film rental was considerably less. From the Plaza, however, it was \$123 for two days, and at the Apollo \$141 for five days. The admission price to the public was less. And then as we go down, we see that it was exhibited in so-called independently-owned theatres and in theatres affiliated with Twentieth Century-Fox at progressively lower film rentals and at progressively lower admission charges. And it is of the utmost significance that the film rentals which these independent exhibitors paid for the privilege of exhibiting this (157)

picture were in almost every instance less than the affiliated theatre. Thus, the Lindbergh Theatre, paid \$45 for the privilege of exhibiting the picture and the affiliated Rock-hill Theatre, which showed it six weeks later, paid a higher film rental, and so on down the list.

The chart shows that there is a fair decrease in film rental paid as the exhibition becomes later and as the admission price charged the public becomes less.

This case involves, in addition to the assertion that there is no competition among the affiliated theatres where they operate, a consideration of three practices. The first practice is called cross-licensing, although these words have nothing to do with the practice. It is a fact that most of the theatres which National operates, in addition to showing the pictures produced by Fox, show pictures made by others of these producers and distributors. The reason for that is simple. Fox itself does not make enough pictures of a sufficient quality to occupy 365 days of screen time anywhere except in New York, Chicago and Los Angeles, certainly not in the smaller cities, and so, the theatre operators must get motion pictures from other producers.

It is also a fact, of which there can be and should be no dispute, that they pay a large share of the money which

they pay in film rental to the eight defendants. That, of course, is because in 1938, when this case was started, the (158)

plaintiff joined as defendants every one who was in the business, but it is also true that they pay to the five companies which have motion picture theatres a large percentage of their film rental. The reason for that is not because the pictures of other companies are excluded, but because the pictures of the five pictures at the box office are capable of running for the longest period of time and bringing in the most money.

As has already been said, most pictures today, certainly in the key centers, in the larger cities, are licensed on percentage and they are exhibited as long as they can be properly exhibited. And so it is the picture, the quality of the picture, that determines how long it will run and what moneys it will bring in and not the name of the company which produced it or the fact that it does or does not have any theatre affiliates.

I have about ten minutes more and I will be finished.

Judge Hand: All right, go ahead and finish.

Mr. Caskey: But there is no conditioning of the licensing of pictures of other companies in the theatres of National and with the other affiliates of these producers licensing the picture. There will be no proof whatsoever on that. The fact is that as far as National is concerned, its pictures are licensed or bought, if you will, in the seven regional division (159)

offices in Kansas City, in Milwaukee and so on. The buyer, when he sits down to negotiate with a salesman from Loew's has no knowledge of whether the Loew Theatres have or have not bought Fox pictures, and if he did have any knowledge it would be that they had not bought very many because the fact is, as we set it out in our brief, that National has paid Loew's year in and year out, 7, 8, 9 and 10 times as much money as Loew's Theatres pay Fox.

Now, there is a very simple explanation for that, and that is that the Loew Theatres play their own pictures in

their first-run theatres throughout the country and that they do not use Fox pictures in New York, but, nevertheless, it is conclusive proof that there is no form of conditioning. National does not buy or refrain from buying dependent upon what the theatre affiliates of the other producer does or does not do. They buy pictures in order to exhibit them, in order to serve the public and make a profit.

This word "cross licensing" is just an epithet; it has nothing to do with the motion picture industry.

The second charge is the charge of price-fixing. It is perfectly true that in the ordinary practice there is an agreement between the distributor and the exhibitor as to the minimum price that will be charged to the public for admission during the exhibition of the picture. We think it perfectly lawful, because the film rental is predicated upon those receipts, whether it be expressed in terms of actual (160)

per cent, 30, 35 or 40, as it frequently is, or whether it be commuted into a fixed flat rental of \$1,000 or \$2,000 or \$5,000. It is also undoubtedly true that the price fixed for the first runs affect the price which other theatres in the community may charge. As the chart on Kansas City indicated, when the first-run theatres back in 1936 were charging 40 cents, the price of the other theatres tended to be lower, but there is not to our knowledge any agreement that fixes the maximum price that any subsequent-run theatre may charge. There is no ceiling, as the word was used, imposed by contract. If there is any ceiling, it is a ceiling imposed simply by the economics of the situation, and there are innumerable exceptions to that. The ceiling, as we will establish, if evidence is required, is pierced in many, many situations because fundamentally the capacity of the patrons to pay is what determines the film rental.

We are all familiar with the example here in New York of the Plaza Theatre which is, although a subsequent-run theatre, a theatre which charges a very high admission price

because it caters to a group of patrons who can pay that price.

In addition to this, and this is the final charge, plaintiff has made the charge that there is a profit-sharing arrangement in the exhibition of motion pictures. The charge has no factual support. Motion pictures, when licensed on percent- (161)

age are licensed for a percentage of the gross receipts, not of the net. It is true that in many instances the contracts provide that the higher the revenue the greater the percentage, just like income taxes; but it is, still just like income taxes, a tax on the gross. The revenue comes out of the box office dollar, of course, but it is not profit, and there can be no reason for the plaintiff to use the word "profit" or to use the word "partnership," except to try to spell out by the use of that word a combination which does not in fact exist.

We think that on the whole case, there will be no proof of conspiracy or combination to monopolize. We think that the individual situation of the company engaged in production and distribution and in the ownership of these comparatively few theatres is no violation of law. * * *

(Adjourned to October 9, 1945, at 10:30 a.m.)

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New York, October 9, 1945;
10.30 o'clock a. m.

Trial resumed.

Mr. Proskauer: Mr. Leisure will speak next for the defendants.

Judge Hand: All right.

DEFENDANT'S RKO'S OPENING.

Mr. Leisure: I do not know how many of the defendants are going to make opening statements. I know that my associate, Judge Proskauer, is going to follow me, and in order that they may better regulate the schedule, I may say now that I intend to take less than thirty minutes of the time of the Court.

If the Court please, we represent the following RKO defendants. These defendants as named in the complaint are Radio-Keith-Orpheum Corporation, which is solely a holding company; RKO Radio Pictures, a wholly owned subsidiary of Radio-Keith-Orpheum Corporation, engaged in the production and distribution of pictures; RKO Proctor Corporation and RKO Midwest Corporation, both subsidiaries of RKO, Radio-Keith-Orpheum Corporation, engaged in the operation of motion picture theatres.

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Keith-Albee-Orpheum Corporation, named as a defendant in the complaint, was dissolved in June 1944. At that time it distributed its assets, consisting of stock in certain theatre operating companies, to B. F. Keith Corporation, a theatre operating corporation which is 99 per cent owned by the Radio-Keith-Orpheum Corporation.

I shall confine myself to outlining briefly the position occupied by RKO in relation to the Government's charges in

this case. These charges are, first, that the RKO Company, as an integrated unit, is an illegal monopoly. Second, that the RKO defendants have combined and conspired with all the other defendants, but principally with the other four integrated defendants, to monopolize the domestic theatre market and to discriminate against independent exhibitors in violation of the Sherman Act. Third, that RKO and the other defendants have combined and conspired to fix the admission prices in motion picture theatres throughout the United States in violation of the Sherman Act.

Now taking up the first contention of the Government. RKO is both the youngest and the smallest of the integrated companies. In its conception it was envisaged as a medium for bringing to the public a varied amusement program, to include motion pictures, radio and television. Like many other enterprises launched in the late 1920s, RKO perhaps has not wholly materialized all the visions of its founders; (164)

but the suggestion that in 18 years against the keen competition of larger and older companies it has achieved a nationwide monopoly, is incredible.

As this Court knows, the United States Supreme Court had decided that whether an integrated combination unreasonably restrains commerce in violation of the Sherman Act depends, first, upon the purpose for which it was formed; and, second, upon the results of its operation. Unless the Government can show that RKO merely as an integrated company was organized to restrain and monopolize commerce, or has, in fact, unreasonably restrained or monopolized commerce, it must fail in its first charge. I have reference to the Appalachian Coal, the Standard Oil and the American Tobacco Company cases.

Now, what does the history of this company show was its primary and controlling purpose?

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RKO was formed in 1928. It was not formed primarily to secure theatre outlets for a production company nor to secure a film supply for a group of theatres. It was formed by Radio Corporation of America, which at that time was engaged in the keenest of competition with Western Electric Corporation for customers in the field of sound motion pictures. Both RCA and Western Electric had developed and were heavily interested in competing devices for recording sound on motion picture films, and for its reproduction in theatres.

Western Electric, through its subsidiary Erpi, had obtained a head start on RCA by licensing its recording equipment to virtually all the large motion picture producers, and by licensing its reproducing equipment to most of the motion picture theatres in the United States. So that by 1928 there were virtually no motion picture producers left to which RCA could license its recording device, and very few motion picture theatres to which it could sell or license its sound reproducing device.

To meet this well established competition, it acquired a small producing and distributing company, known as FBO. This company, by change of name, is the present RKO Radio Pictures. As an outlet for its sound reproducing equipment, and also for its sound pictures, RCA acquired the Keith-Albee-Orpheum's circuit of vaudeville theatres. This (166)

circuit was made up of large, well equipped vaudeville houses located in a number of the larger cities throughout the country. Each was feeling the competition from motion picture houses, however, in the cities where it was operating. The following year the newly formed RKO acquired the fine vaudeville houses of the Proctor group and others in New York City, and in certain of the larger cities in upper New York State.

In the following year, 1930, it acquired a few vaudeville and motion picture theatres in Cincinnati, Columbus and Dayton, Ohio.

During this early period, the primary hope of RKO in the operation of these theatres was the promotion of a successful circuit showing a combined program of vaudeville and pictures.

The exploitation of motion pictures was used primarily as a means of increasing the patronage of the vaudeville houses. Gradually, however, it became apparent to the executives of the company that the success of this theatre chain was going to depend more and more upon the motion pictures offered to the public.

The effort to keep vaudeville alive finally failed and today RKO's circuit is a motion picture circuit.

The facts which I have very briefly outlined cannot be disputed. Contrary to the Government's contention that the (167)

RKO theatre chain was built up for the purpose of monopolizing the exhibition of motion pictures, these facts will clearly establish beyond any dispute that the basic chain upon which RKO still depends was built up as a vaudeville circuit, and was acquired by RKO in the hope that such a circuit could remain in existence when its vaudeville presentation was supplemented by the exhibition of motion picture films.

Clearly, the purpose in integrating these theatres with a production company was not to obtain a monopoly either in the production, distribution or exhibition fields. Nor was that its effect. On the contrary, it brought a small production and distribution company into competition with the larger and already established production companies, and in the exhibition field it brought a group of finely equipped theatres in the larger cities into competition with motion picture theatres then existing in those very same cities.

The result of this integration was to promote rather than to restrain competition in the production and exhibition of motion pictures.

Let us see what has become of this integration as of today, seventeen years later. We have the same production and distribution company, now re-named RKO Radio Pictures.

It has no monopoly of the production of feature pictures.
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In the 1943-1944 season it produced only seven per cent of the features produced in the United States. And it has no monopoly of stars or feature players. We shall show that it has extremely few such persons under contract to it. It relies principally on those stars and feature players which it obtains in competition with all other producers.

What about the distribution of motion pictures? Neither has it any monopoly in the field of distribution. It distributes only seven per cent of the feature pictures offered by all distributors. It has not, as the Government charges, closed its own distribution facilities to those producers who have no distribution outlet of their own. On the contrary, independent producers, both large and small, avail themselves of the distribution facilities of RKO.

The Government's figures will show that in the 1943-1944 season 18 per cent of the pictures distributed by RKO in that season were independently produced pictures, and these pictures accounted for 30 per cent of the domestic revenue received from all features distributed by RKO in that season.

We shall show that not only is RKO dependent on independent producers for a substantial part of its business but that it is and for years has been engaged in the keenest of
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competition with the other distributors for the right to distribute feature pictures produced by independent producers. For example, RKO, after intense competition with other distributors, secured the distribution rights to Walt Disney's famous technicolor animated cartoons. A few years later one of these defendant distributors secured the distribution rights of a Disney picture from RKO. RKO now has the Disney pictures back again.

Again, RKO was the first to distribute the independently produced March of Time, but Twentieth Century-Fox has now outbid RKO for these distribution rights, and now distributes that feature picture.

But what of the Government's charge that RKO, as an integrated company, has a monopoly of first-run exhibition? Twelve years ago, starting after RKO became an integrated unit, it operated approximately 150 theatres. Today it operates but 107 theatres. The net effect of the last twelve years of RKO theatre operations has been a decrease in its theatre holdings of approximately 30 per cent. This fact alone, it seems to me, refutes the assertion that RKO now has or ever has had a monopoly control of exhibition.

Of these 107 theatres which RKO owns or operates today, 72 are the very same theatres that it purchased from the Keith-Albee-Orpheum and Proctor and other vaudeville interests between 1928 and 1930. Acquired at that time to afford a show case for RKO's product in 34 of the major population centers, they continue today to serve that purpose.

Of these 107 theatres, 32 are subsequent run. So that from the standpoint of any alleged nation-wide first-run theatre monopoly, RKO owns and operated but 75 first-run theatres in 18 of the 48 States, and the District of Columbia, in the territory between here and San Francisco. (169-A)

These theatres represent less than 4 per cent of the total of theatres claimed by the Government to be affiliated with all of the defendants. They represent less than three-tenths of one per cent of the total of theatres in this country.

Now the Government has selected 73 cities which it names in its complaint having a population of 100,000 or over as its testing ground of nationwide monopoly. According to the Government's figures, RKO has no theatres whatever in 46 of these 73 cities. It has theatres in but 27. In 10 of these 27 cities RKO operates in first-run competition with an independent exhibitor or exhibitors. In 21 of these 27 it operates in first-run competition with theatres affiliated with one or more of the other defend-

ants. In every one of the 27 cities it competes with other theatres operating on some run.

And from the viewpoint of dollar business done by RKO theatres, the picture is no different. During 1944 RKO theatres collected admissions of \$35,000,000. Compared with the Government's estimate of a total of one billion dollars in theatre admissions paid in 1944, the RKO theatres' percentage of 3.5% certainly does not look like a monopoly of the exhibition business.

Judge Hand: What do you understand to be the Government's theory on which they assert there is a monopoly? Of course, the case is not as simple as your argument would (171)

indicate. They have some other theory based on conspiracy, or something else, being responsible; in other words, for the acts of all the others.

Mr. Leisure: That is one of the points, if your Honor please. I am addressing myself now to the complaint and the trial brief and the statement in Mr. Wright's opening. I have not come to the other two points yet, and I will endeavor to answer your Honor's questions in those two points.

Judge Hand: All right.

Mr. Leisure: Mr. Wright's statement yesterday was that each of these producer-exhibitors is a combination illegal in and of itself. I am addressing myself as to that with respect to RKO in discussing this first point.

To summarize briefly, we will show, that RKO as an integrated company came into existence through force of competition; that the effect of its coming into existence has been to bring about greater competition in all three fields in which it is engaged. It has no monopoly, nor has it the power to effect a monopoly in any one of these three fields.

As a producer and distributor it produces and distributes but 7 per cent of all the features produced and distributed. It has not used its control of its own distribution facilities to bar independent producers from access to the

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market. On the contrary, a substantial proportion of the pictures which it distributes are independently produced, and a still more substantial proportion of the annual return on the features which it distributes is represented by independently produced product,—product for which it actively competes in the open market.

In the exhibition field its 78 first-run theatres constitute less than one per cent of all the theatres in the country. It participates in the total theatre receipts of the country to the extent of less than 3.5 per cent.

RKO has not in fact eliminated or restrained, nor as a single integrated unit has it the power to eliminate or restrain competition in any of the three fields in which it is engaged. So much for the Government's first charge against RKO.

I now turn to the Government's second basic charge, namely, that RKO has combined and conspired with the other defendants to restrain and monopolize the production, distribution and exhibition of motion pictures. The Government does not claim that it has any direct evidence of such combination or conspiracy. There is no suggestion in the trial brief or in its appendices that there is any actual overt combination or conspiracy between RKO and the integrated defendants. It is not claimed that RKO has at any time combined or conspired with any other defendants in any conferences, meetings or agreements to restrain or

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monopolize interstate commerce. And the complete absence of any corporate connection between RKO and the other integrated defendants is clearly demonstrated by the plaintiff's description of the corporate structure of the integrated defendants in the Government's trial brief, at pages 5 and 6, and the Appendix A, pages 1 to 8.

RKO is not asserted to have any interest in Fox, Loew's, Paramount or Warner. None of these companies is asserted to have any interest in RKO. So far as their corporate

structure is concerned, therefore, each of the integrated defendants is a separate and distinct entity and should be treated as such. The most that the Government claims is that certain conduct claimed to be both common to and unique with the five integrated defendants will support an inference which it will ask this Court to draw, that these defendants have agreed to combine and conspire together.

Thus, the Government asserted that the defendants have conspired to monopolize the production of motion pictures. It asserts that the integrated defendants have tied up the majority of stars, feature players, outstanding stories and other items essential to production; that while they have freely exchanged such stars, stories, etc., among themselves, they have refused to make them equally available to non-integrated defendants or producers.

The Government has admitted, however, that it intends to (174)

offer no proof of any such activities, but instead intends—and I quote—"to argue from all the facts" that such a conspiracy exists. But in its trial brief the Government appears to have receded even further from this original position, because nowhere in the trial brief does it so much as mention, much less argue, about a monopoly of production or distribution.

So far as RKO is concerned, we do not expect to rest merely on the Government's failure of proof. We intend to show affirmatively, first, that independent producers have increased and prospered, and that their product is in active and unrestrained competition with us. Second, that RKO does not rely for its production activities upon any engrossment of its own of stars and feature players, or upon any understanding with the other producers. On the contrary, RKO obtains the stars and feature players necessary to its production in competition with other producers, both integrated and non-integrated, both defendants and non-defendants in this case.

As to distribution, as I have already indicated, RKO distributes a substantial proportion of the pictures of producers

who have no distribution outlets of their own, and is in active competition with all of the other defendants to secure the right to distribute such pictures.

Let me summarize: RKO is in active and unrestrained

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competition in both the production and the distribution of motion pictures. No inference of combination should be drawn in light of that competition.

In its original complaint, paragraph 86, the Government spoke of this as a "nationwide monopoly". In its amended complaint, paragraph 163, it describes this as a monopoly in 80 per cent of the cities with populations of over 100,000. But in its trial brief, page 21, it redefines it as a monopoly in 80 per cent of the towns where the integrated defendants control two or more theatres.

Basically, the Government's theory of concert of action as to exhibition is this: The theatres affiliated with each of the integrated companies need product. As to this the defendants are surely no different from other theatres in the United States. But since each of these theatres is affiliated with a company which has product to offer, the Government argues that an RKO theatre, for example, can and does obtain a Paramount or a Warner product in competition with a non-integrated theatre by being able to assure Paramount or Warner that when Paramount or Warner need product in theatres, they may count on RKO to give their theatres preference over non-affiliated theatres competing with them. This is the same theory, let me state, that the Government applied to alleged monopoly of production but which charges, in that field at least, it has now apparently abandoned.

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Originally the Government flatly asserted that one producer-exhibitor defendant licensed its films in theatres of another such defendant on the condition that the latter would in turn license its films in theatres affiliated with the former. In reply to interrogatories, however, the Government admitted that it had no such proof, and it refers to no such

proof in its trial brief. Instead it now relies on what it calls "cross licensing" as showing concert of action between these defendants. It admits that this—and again I quote—"is not cross licensing in the usual sense." And indeed it is not. The Government charges that when Paramount, for example, licenses an RKO theatre, it does so under a contract whereby Paramount receives a percentage of the RKO theatres' gross receipts. When RKO licenses a Paramount theatre it is under a like form of contract. This, according to the Government, gives each licensor "a share in the theatre operating profits" of the other, with the result that each of these integrated units has a "vested interest in promoting the business of the theatres affiliated with each other at the expense of independent competitors."

To put it in plain English, the Government now charges that since a percentage contract gives each integrated defendant an interest in the "theatre operating profits" of the (177)

other, it is to the interest of each to deal with the other rather than with non-integrated exhibitors.

As to this charge we expect to show that RKO's license contracts give it no interest whatever in any theatres' operating profits. We shall also show that RKO's use of percentage contracts is by no means confined to theatres affiliated with its co-defendants, but that it employs the same form of licensing no differently and to no less extent in licensing unaffiliated theatres.

Again the Government seeks to infer concert of action from the asserted tendency of theatres affiliated with these several defendants to exploit from year to year the same lines of product. We shall show, in the case of RKO, that precisely the same pattern is followed by independent theatres. Beyond this, however, we shall show that the desire of every theatre operator to retain the same product lines from year to year is not attributable to conspiracy or agreement between competitors but is the inevitable result of competition between those engaged in supplying the public with any

service,—in this case, regular entertainment at an established price.

Then, finally, the Government charge that RKO has conspired with the other defendants to fix admission prices in theatres throughout the country. As to this last and final charge by the Government, we flatly deny the charge. We expect to show affirmatively that RKO fixes the admission

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prices of no theatre either acting individually or otherwise.

DEFENDANTS WARNER'S OPENING.

Mr. Proskauer: May it please your Honors, it falls to me to be the anchor on the team of the five theatre-owning defendants. Your Honors have been so patient in listening to Mr. Davis and my other youthful colleagues in their clear presentation of a large area of this case, that I realize that that throws on me an obligation to this Court to be brief and to be non-repetitious. I assure your Honors I shall endeavor to carry out that obligation to the Court.

The interruption by Judge Hand of my colleague, Mr. Leisure, leads me to grasp the metal. I suppose no one within the sound of my voice would contend that there is the slightest suggestion on the Government's part here that any one of these defendants individually is engaged in an illegal monopoly. The gravamen of the Government's case—and I like to meet situations head on, with your Honors' permission—is in this charge that collectively we have in some way conspired to make ourselves jointly a monopoly; and the two big issues in this case are, first, whether there is the slightest tangible proof of the existence of that conspiracy without which the Government's case must totally fail; and, second, and no less important, whether this so-called integration—

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which is nothing but a high-salutin phrase meaning that we all own theatres and produce pictures—whether that is a con-

tributing cause to any alleged monopoly, and whether its removal is necessary and useful, or, on the contrary, destructive of a great industry and absolutely destructive of a great public interest. And it is to those fundamentals that I shall address myself.

In the few remarks that I shall make I take for my text these words of Justice Holmes: "General principles do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than an articulate major premise." And when I heard my good friend, the Assistant Attorney General, yesterday mouthing these platitudes from a series of charts, statistics—and I must respect the amenities as Mr. Davis did, and I won't refer to blankety-blank statistics—but I will show your Honors in the evidence that we shall adduce not only that those statistical statements are in themselves half-truths when one put flesh on the skeleton which the Government has produced in this courtroom, but I will show you further, and the evidence of the defendants will show you further, that when you look at this whole picture and disassociate yourselves from the spell of the legalism which characterizes the ardor with which the Government advances what Mr. Davis characterized as a fad or a hobby, and bring to this case that experience, that knowledge of the (180)

subject matter which you will get from oral evidence, and that common sense which we have every right to believe will be exercised by this Court,—that no matter whether you find an abuse here or an abuse there, in 25 years of the history of the most complicated and difficult industry that any court has even had to examine into, you will never say that a sound judgment requires you to strike down that industry by throwing it into chaos with a decree that wrecks the whole structure of the industry as it has existed with the approval of the Government for a quarter of a century.

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Now I shall advance these theses: there is no combination or conspiracy here. On the contrary, this so-called integre-

gration is necessary, appropriate and beneficial to the public in the production of moving pictures, in exhibition and in distribution. I shall respect Judge Hand's aversion to genealogy, but to some extent I will refer to it merely to demonstrate certain definite propositions of fact which have legal significance. I shall use it to point a moral, not to adorn a tale. And let me say at the outset for what purpose I shall refer briefly to the history of the Warner Company. My friend Mr. Leisure referred to the Steel case. There the great issue was whether integration was illegal per se, and the issue that arose between the minority and the majority of the court was whether that integration came into being as a benevolent and natural evolution or whether it suddenly sprang into being as an instrument of oppression. That was the dividing line between the majority and the minority opinions, and I propose, by reference to the history, to show you that we come in the prior category.

Secondly, I shall refer to the history because it is a part of the Government's bill that we fall within the ban of Section 2 of the Act. Judge Hand will recall, and I am sure you others will, that in the Aluminum opinion Judge Learned Hand wrote, in order to fall within Section 2, the monopolist (182)

must have both the power to monopolize and the intent to monopolize.

Therefore, I address myself first to the question, did we get these theatres, we producers, to get the power to monopolize? Did it give us the power to monopolize? Did we do it with the intent to monopolize?

As I review these facts briefly, which I shall show, I shall claim to have demonstrated to your Honors that integration was born not in agreement, not in conspiracy, it was born in trade warfare and has remained to this day an element not of agreement but of dissension, of fight and of competition.

Let me point that briefly from the history of the Warners. They started back in 1915 running a couple of Nickelodeon

theatres in a small Pennsylvania town. When it got to 1916, they began to produce pictures in a small way. There were giants in the land in those days, my friend's client here, Famous Players and all those other great companies which had reached enormous stature in the production and exhibition of motion pictures, and exactly the same structure existed with one possible exception, that the theatre owning had not yet reached the proportions which it has reached today, but as to clearance, as to run, as to all those other factors of the industry which are utterly indispensable, and the Government recognized it in the consent decree, to the (183)

administration of this industry, the conditions were the same.

And Warner nearly went on the rocks. And what saved them? The same thing that saved every competent competitor that entered into this field, showmanship, vision and ability, which can no more be monopolized than can the free air of heaven.

We reviewed this history in a trial before Judge Nields—not an antitrust suit; a different type of case. And I shall read one or two of his observations on this as the most summary way of putting it to your Honors. They had the showmanship to show a picture at the right time in the right place to get the public imagination, and that was the dramatization of Judge Gerard's book, his years in Germany, and from the moment they did that, all the powers of Famous Players Lasky, all the power of Fox, all the power of these giants in the industry could not keep them down, any more than today you can keep down Walt Disney, or Selznick, or Monogram, or Republic, or all of these independents, and I am using that word with the same apology which Mr. Davis made for it, the apology for the Government, any more than you could keep down these companies that, while this suit has been pending, have invaded the field as competitors to us in the production line and given us the fight of our lives to hold on.

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Those non-theatre-owning three defendants! Why, if the Government proceeded on the theory today on which it joined them before, we would have a number of other defendants who follow exactly the same practice in the administration of the distribution and production of pictures other than ownership and who, your Honors, the records will show, and I shall refer to some of the figures very briefly, knowing your Honors do not want to carry a lot of statistics to your chambers with you, they will show that these companies, so far from being ruled out as competitors in the production field, have waxed strong until there are new giants in the land.

How did we come to get these theatres? And did we get them as a means of monopoly? Or, to use Judge Learned Hand's phrase, "with the intent to monopolize"?

We got down into the '20s and then Warners did another one of those things which makes monopoly or conspiracy to monopolize an impossibility in this industry. They made practicable, commercially, the scientific investigations which were the basis of the talking picture. And on a night in 1926—I am not going to refer to many pictures by name, but one will stand out—there was thrown on the screen in the City of New York "The Jazz Singer," the first talking picture. And how did our giant friends receive that? They had stars used to making silent pictures, they had machin-

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ery for making silent, not for making talking pictures. It cost, in those days \$2,500 to install in any theatre the necessary apparatus to exhibit a talking picture—\$25,000 I should have said, your Honors, a little zero does not make much difference; it is nothing—\$25,000 to put the apparatus in any one theatre, and here were these Warner Brothers, who literally had given their life for this, because it is of record that Sam Warner, who developed it, died as the lights were flashing on the screen of the "Jazz Singer." With this priceless contribution to the public, they were unable to show it because they did not have any theatres in which to show it.

Now, your Honors, to show you that I am not talking rhetoric, we got an opportunity to buy the Stanley chain of theatres—the Stanley Company. The Stanley Company owned a chain of theatres, the most important of them chancing to be located in the City of Philadelphia. The Stanley owned a third of that First National Pictures Company, that my friend Mr. Seymour told you about, that again was born, not in conspiracy, but in warfare, started on the producers by the theatre owners of the country. And First National had a studio of decent proportions where the Warners had not, and an overture was made with us to go into the chain of operations by which we ultimately acquired the Stanley (186)

stock including those theatres and this studio, and I leave it by giving your Honors just these words of Judge Nields, which I shall prove, "this company had to enter the theatre business or retire to a subordinate position." There was only one large chain of theatres not controlled by competitors and we bought it, and that, says the Government, is conspiracy to monopolize. And Judge Nields said, to save ourselves from destruction, we bought this chain of theatres, used it to fight those who were fighting us in our endeavor to put talking pictures on the screen, and ever since have been engaged in active, open and bitter competition with every one of the other defendants in this case.

That is all the genealogy in which I shall indulge.

I say to your Honors that there is no monopoly of production. I shall not indulge in any lengthy diatribe about what we do individually, because I have recognized, frankly, that the gravaman of this is conspiracy; but in passing, I remark that in the years 1943-1944, the last for which statistics are available, we produced 4 per cent of the 442 features released, 7 per cent of those released by all the defendants, 14 per cent of those released by the five producer-defendants, and all the defendants together produced but 60 per cent of the features released in the United States. And these five alleged malefactors—malefactors because they own

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theatres—produced what? Just 35 per cent of the features released in the United States, and yet my friend puts in these charts, which until you get them in perspective, are just as misleading as though they were actually false.

I have told your Honors of little men who have been able to rise to the top in this industry, and I illustrated it, and I am now talking to the legal proposition that whether you take us alone or as alleged conspirators, it is not only not a fact that we monopolized in production but we cannot.

Where do we get the material of production? We go to the stage and get a play. Anybody else can. We go to the street. Stars? Do we pick them from heaven when they have risen at their zenith? We get them the way anybody else gets them. We got Bette Davis, now getting thousands and thousands of dollars a week, when she was an actress getting \$400 a week. We got Errol Flynn, whom I think even this sedate court must know of—I am at a little disadvantage because, when I tried that case before Judge Nields, I found he was a moving picture expert, he knew who the stars were, and who the producers were, and the date of production of every picture that was ever referred to, and I am shifting my point of approach—these people talk as though you could go and make an agreement that you are

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going to corner the star market—we picked Errol Flynn out of a place where he was getting \$150 a week. If my recollection serves me, even Mr. Davis' client had the astuteness to go to a little music hall somewhere on the continent of Europe and pick Greta Garbo from a vaudeville stage. That is the way the star system is made, and that is why people like Selznick and Disney—perhaps I have got the wrong ones for the particular point, but that type of independent producer—could always go and break down any alleged monopoly in the stars who go so much into the importance and the profitability of these moving pictures.

I am a little confused at times by the variances between Mr. Wright's bill and his mild utterances in this courtroom.

This bill is replete with allegations of improper trade practices, muzzling competitors, and there are just little references to them in his brief. I do not like to be wholly silent about them and yet I don't want to burden your Honors with meeting a man of straw, so I refer to but one of them. He talked at some length that we built up this monopoly on production, and I am talking about production now, by a process of exchanging stars and exchanging materials. Well, your Honors, the practice of exchanging actors is as old as the theatrical business. My astute young partner here dug (189)

out for me last week, and wanted me to urge it on you, but I won't, the fact that Covent Gardens and Drury Lane exchanged players back in the eighteenth century, but we don't have to go that far back on the ox. But what is the truth here? We have a lot of players under contract, and each of them has some kind of specialty. At one moment we are not showing a screen play which requires that particular man, and we exchange actors. When I say "we", whom do I mean? Do I mean Paramount, and RKO and Loew's? Not at all. I mean everybody in the industry.

And I just give you this much figure to point my statement, that there isn't the slightest discrimination against the so-called independents in this practice, that they participate in it and are the greatest gainers by it. Of 66 players that we had under contract in 1931, and I am going back to the time when these allegations were made, and the figures are about the same up to now—in the four years from August 31, 1938, we asked the loan of 79 players from other majors. How many of them do you think we got? Four. In the same period we gave or lent players 44 times out of 184 requests. We asked independent producers for a loan ten times, and we got it once. They asked us 65 times, and we gave them 13.

Now those are not just paper statistics. I am making a (190)

distinction between two kinds of statistics. I am showing to your Honors that there is nothing in that of the Government's.

And then my friend talks about the terrible exchange of the use of materials and equipment. Judge Goddard may recall that when we opened this case before, we showed that those things were so important that Universal lent us a pair of pants for \$3.75, Selznick lent us a corset for \$6.00; we lent Fox a battleship for \$350, and paid Paramount \$1.20 for the use of some pushcarts. I am not trying to meet that issue by just ridicule; I am telling your Honors the evidence will show that it is the most arrant de minimis. Let us go on: I have shown you how the little man always comes up. He has come up. "Gone With the Wind," Selznick; Walt Disney; Charlie Chaplin; the screens are alive today with the production of men who have the showman's instinct which, if it is exercised, will build a path to his door despite every alleged conspiracy, alongside of which the path to the man who built the mouse trap is nothing but a rough mountain trail, because never forget, your Honors, that despite what Mr. Wright told you yesterday, there is the greatest shortage possible of high grade features, and everybody clamors for them. I shall say something about that in another connection in a moment, but let me register this point at this moment, (191)

that nobody who ever produced a decent picture had the slightest difficulty in getting it shown.

I have been a little harsh, perhaps, and I think not unduly so, in talking about Mr. Wright's charts. I have got some here myself. The chartist movement affects us all. Let me illustrate a little what I am saying. Here he produced yesterday a chart headed "Exploitation of Universal's Luckiest Girl in the World," and it is a beautiful chart, and what it shows is that that play got no first-run in the City of Philadelphia, about which I shall have something more to say in a moment. And the inference he asks your Honor's to draw from that is that Warners had conspired in some way to keep Universal from showing the Luckiest Girl in the World in Philadelphia, and, therefore, it got no first-run showing. Well, your Honors, I am going to show you the

worthlessness of that paper evidence. I am going to show you it is waste paper, because the Luckiest Girl in the World was so rotten that she was lucky to get shown in any ten-cent theatre. I don't mean to be offensive to my friends of Universal over there, but I think they will agree with me that rarely was a worse picture put on the screen than that picture, and yet it is soberly offered here in the form of a grandiose chart to show that the reason it was not shown (192)

first-run in Philadelphia was that Warners were conspiring against another one of these co-defendants to not show it first-run when the real fact was that nobody wanted to see the picture.

I have said here in my notes the independent producer has always been given distribution and that competitively. We will show that. Walt Disney! Did we ever shut him up? No, RKO produced his pictures or did—distributes them. Selznick! Did we crush Selznick when he did Gone With the Wind? Not at all. Loew's distributed his picture for him. And when he did Rebecca, did we dominate him? Not at all. He got a better bid from United Artists and he went and distributed it through them. Harold Lloyd through Paramount. Why, your Honors, I won't pile Pelion on Ossa. I will show you that no independent distributor in America, and there won't be any evidence to contradict it, ever had the screen blocked off from him by a refusal to show his pictures. And the reason for that is not that we are so lily white and pure. The reason for it is enlightened self interest. And that enlightened first interest is that we need good pictures so badly that we would be cutting our own throats to close avenues of exhibition to any man who could make a good picture.

My friend is a great manufacturer of categories. This (193)

case is built for the Government on the artificial creation of categories that practically and factually do not exist. What do I mean by that? Mr. Davis talked yesterday about

the way we are always described in antithesis to the independent, first-run category. What is this first-run business? A moving picture has to have a first-run, and we show this by evidence, in one of these magnificent metropolitan theatres or nobody makes any money out of it, neither the producer nor the little exhibitor for whom Mr. Wright's heart is so profusely pleading. That little man gets the benefit of all the advertising, all the publicity and all the acclaim that comes to a moving picture when it is shown up here at an independent first-run theatre like the Rockefeller Theatre or at one of our own first-run theatres. And so it goes all over the country.

And the real situation, your Honors, is just this: the public gets what it wants to pay for. The little man on the Bowery does not sell a jewel like Tiffany's, and he cannot, and reasonable competition does not require that the Government should intervene and see to it that he should. The analogy is even more favorable to us because the truth is that by this system of using these first-run theatres as media for the exploitation of the picture and as a source of recoupment for us, fairly certain recoupment to us of the enormous (194)

outlay for these pictures, whose costs now run up into the millions where they used to be in the hundreds of thousands, the little exhibitor gets the benefit of that and there isn't a man, woman or child in the United States who, during the last twenty years, has not been able to see for ten or twenty cents every moving picture that is produced in the United States, no matter how expensive it was to produce, or to exhibit.

There is a public interest in that and I am going to show you in just a few moments how that public interest will be stricken down if the Government in this case should get the extreme of its demands.

So much for production. Exhibition, and I have turned over to exhibition, I am talking about these first-run theatres: we have no monopoly either alone or in combination.

We own 3.2 per cent of the theatres in the United States, 6 per cent of the seating capacity; we own no theatres in 29 States; we have a concentration of theatres in one local area that is, as I explained to you in our genealogy. We happened to get these Philadelphia theatres. And we own 23 per cent of the theatres in New Jersey and 16 per cent of the theatres in Pennsylvania. Others have given you the statistics, which I will not repeat, showing that in combination we are not a monopoly, but again I want to grasp the metal: Let us go right ahead on this Philadelphia situation (195)

about which my friend makes a great deal. When we acquired those theatres, the Government brought a Clayton law suit against us back in 1929, I think it was, or somewhere thereabouts. It must have been a little later because I was retained in it and I came back to practice in 1930. It was somewhere around there. They investigated the situation, and what did they do? They discontinued the suit. What have we done with those theatres? Have we increased them? Not at all. We have got fewer theatres in the area now than we had then, and the competition that arose has been enormous and successful.

My friend is going to say, "How about the Goldman case?" And your Honors will be referred to the opinion in the Goldman case. The record in this case will not be the record in the Goldman case. For myself and for my colleague, I say, *peccavi*, we made a great mistake in the Goldman case. We believed there was still such a thing as *stare decisis*, and we found there wasn't. The District Court in an exactly similar case held that on that kind of showing there could be no inference of conspiracy from the failure to take the stand, and Judge Kilpatrick decided that case in our favor. The Circuit Court reversed, basing its reversal substantially on the ground that the inferences undenied gave a basis for a claim of conspiracy.

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Conspiracy to what? I will show you in this case that those inferences will be squarely denied. It was a most peculiar situation, which I will not take your time to go into now, but to assure you that when it is explored you will find that it has no relevance to a general nationwide conspiracy such as here alleged; and even then, if they call my friend Goldman to the stand, I will show from his lips that under the conditions of alleged monopoly which he claimed existed, he had an open fight with us, built up a chain of theatres in Philadelphia and in the surrounding country out of which he was making approximately a quarter of a million dollars a year net profit. That is the kind of monopoly we have been running over there. And all these Philadelphia figures which are thrown in our teeth because of that coincidence that this Stanley Company happened to be concentrated in that area, all of them are subject to the inexorable course of events which there is no conspiracy or agreement either to block or which any such conspiracy or agreement could block.

To Goldman we have already lost the key theatre, the Carlton Theatre, in open fight. He has taken it away from us, and two important second-run theatres. He is operating a first-run theatre, and the Fox Theatre, which is one of our old first-run theatres which we had under lease, that is gone too; so that nature is taking care of this situation, I respect-

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fully submit, much better than the Government or a court decree can take care of it.

Now, I want to address myself to this conspiracy thing for a moment: What are the Government allegations? What are the Government allegations of fact from which it wishes you to draw the inference of conspiracy? They say, "You are cross licensing." I am not going to repeat what my friends have said on that subject, but I am not content to let it go at that. When Whitney Seymour told your Honors yesterday that his local theatre managers, when they had pictures had no idea in the world what Paramount was leas-

ing to anybody else, perhaps it sounded incredible. It happens to be true. More than that is true. Warner's theatre department, the department that operates theatres, is run as a completely separate entity from the department which leases films to other people. They have no connection with each other whatever. That sounds incredible. Well, let me give you, as a member of this chartist movement, one or two figures which demonstrate that it is true. If Mr. Wright could show that there was, in the vulgar parlance of us non-Government attorneys, what is called back scratching, and that we share profits in the sense that we say to Paramount, "You license this to us and we will license this to you," and there is some proportion between them, then I would have something to fear; but if I can demonstrate that is utterly (198)

untrue, I have knocked the props out of the whole basis of the Government's contention.

Let me give you just one or two figures out of a great many here. There is no pattern whatever in the film rental paid by Warner from which a combination can be inferred. Last year we paid Mr. Davis's client \$3,800,000 for film rentals for our theatres. How much do you suppose Loew's paid us? \$200,000. Here in the year 1931 we paid Paramount 5.6 per cent of our film rentals. In another year we paid them 16 per cent; and it varies year by year so that there is no relationship whatever or uniformity in the pattern.

Now let us put another acid test to it. There is no pattern from which combination can be inferred in film rentals by a comparison of what one company pays us and what we pay them in any year. I am just going to take one or two of a whole mass of these things to illustrate what will be indubitably proved here. In 1944 we collected from Paramount 17 per cent of the billings. In 1934 and 1935 we collected from them only 9.8 per cent. I read this. The percentage of Warner theatre films rental paid to Loew's in 1937—I take that not as a typical year but as an extreme year to make my point, assuring your Honors that it shows the lack of pattern

for every year—we paid Loew's 19.8 per cent of our film rentals. We got from them $\frac{1}{10}$ ths of one per cent. And you (199)

can take that—and I want to make this clear not in the specific figures but in its real import—you can take that by seating capacity, by film rental; you can weight it any way you please; and I said to your Honors that we shall show without fear of the slightest possible contradiction that there is no relationship whatever in any one year between the film rentals we paid in to our competitors and the film rentals they pay us. And when I have shown that the base is gone from the inference sought to be drawn from these tabulations of Mr. Wright's.

There is no uniformity in the method of sale. We sell in certain blocks. They sell differently.

There is no uniformity in the time of the contracts for exhibition we make. We may make a contract with Loew's to get their product for a year; and they make one with us for three years. I do not state that as a fact, but merely as an example of what the facts themselves will demonstrate when I put these contracts in evidence before you, and I leave that subject with the assurance to your Honors that there is a complete absence of any lack of pattern from which this inference of conspiracy can be drawn.

Mr. Davis wants me to make it clear this matter of gross payments for the aggregate on individual films licensed and not arbitrary percentage splits. I think that has been made abundantly clear to your Honors, and I state it in quotation from my young friend.

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Now, something has been said about these Appeals Board decisions, and I am going to talk about them as bearing on this evidence of conspiracy and as bearing also on this question of the character of relief which is the sole issue in this case—I overstate that—which is by far the chief issue in this case. I have never known any judicial adventure to result so successful as has the machinery to which Judge

Goddard affixed his signature in that consent decree. We are told that there were certain defects in it, and perhaps there were, and we were hopeful that when those hearings were ordered by Judge Goddard before the Appeals Board, that any little defects or any big defects, if you please, could be corrected. Certainly we stood ready to correct them to put this industry on a practicable basis. But we are met by the suggestion that nothing will do excepting to kill the goose that lays the golden egg, strike down the industry. And one reason for that, as suggested by Mr. Wright's opening yesterday where he referred to these Appeal Board decisions, was that they showed us to be somewhat infamous, when nothing is further from the truth.

I will just give you in about two sentences the experience of Warner before those Appeal Boards. We were parties to 75 complaints as distributor and about 10 as theatre exhibitors. In the 10 cases we were charged with unreasonable (201)

clearance. In one of those cases the reduction of clearance ordered was two days, and the maximum reduction ordered in any case was seven days.

Now, Mr. Wright said that showed we were still engaged in illegal clearance. What the decree says is that reasonable clearance is recognized as valid, and because honest men may differ as to whether clearance is too long or too short by two days, and the Appeal Board finds against us to the extent of two days or seven days, Mr. Wright says that that shows you are criminals because you are indulging in unreasonable clearance.

Your Honors, I do not have to labor that proposition to this Court. The mere statement of it shows the utter confusion in deciding in a complicated situation that most difficult of questions—what is reasonable? What on the one hand, and on the other hand that quasi criminal, utter disregard of the decencies which inhere in a charge of violation of the Sherman Act.

Now, how did we fare in these other cases? We sell to 14,000 theatres in the United States. There were reductions

against us in 50 cases in four years out of 14,000 theatres. Does that show this criminal, this quasi criminal approach which Mr. Wright asks this Court to infer from a series of papers that your Honors when you come to consider them, (202)

in the light of these facts you will regard most of them as wastepaper.

Now, I see Judge Hand looking at the clock, and I do not blame you. I am going to come to a speedy conclusion. I want to talk about this ultimate relief of the Government's. These theatres provide a sure outlet for pictures and thus make it possible for us to spend these millions. What is going to happen if you take that away from us? But Mr. Wright says we will have a fine competitive system. Well, that fine competitive system, I will show you by evidence, is not necessary to competition, and in the form in which he puts it will strike down necessarily the quality of these pictures. What does that mean from the public point of view?

There is one phase of this case that has never been referred to. The evidence in this case will show that these companies break about even on their domestic business. I do not mean that to be taken literally, but by and large. The profit comes in the foreign trade, and in a normal pre-war year these companies brought into this country an average of \$100,000,000 a year—in return for what? Materially a few pieces of film. There is not another industry that the imagination can conceive of that has fed into this country so much money for so little. And today we are standing with our backs to the wall fighting discriminatory legislation in Great Britain, in France, in Czechoslovakia particularly, (203)

and practically in every country in the world whose governments are trying to drive out the American film. And what is it that enables us, if anything, to hold the fort? It is the quality of our pictures. It is the ability that the ownership of these theatres gives us to take the risk of putting \$2,000,000 or \$4,000,000 into a production like "Gone With

The Wind." And strike that down and this industry—your Honors, this is not rhetoric—strike that down and this industry is sunk.

I shall show you many another public disadvantage. It is through the ownership of these theatres that we put out what I will call for want of a better word public relations pictures, like Disraeli, Pasteur, Zola, Mark Twain. It is through these theatres that we are able to test the popular imagination, and these theatres gives us no domination as to what should be shown. Your Honor asked the question yesterday, Who determines what should be shown? The answer to that question is the public determines it. We can no more flaunt public opinion and live than we can jump in the middle of the sea and survive. We are responsive to public taste, and these theatres give us the opportunity to feel that out, to test out and to produce these pictures which has made this industry one of the greatest national assets in America in relation with the foreign world, and given to the American public for nominal cost the greatest possible (204)

development of an amusement industry that the mind of man can conceive of.

And why does he want to strike it down? I use a phrase that has the tang of the street but is made respectable by Dean Wigmore's use of it. In referring to a certain rule of evidence he used the phrase "mumbo-jumbo." I should like to link that to what my brother Davis said yesterday. We get this lingo about an integrated industry, about the evils of integration. And when you ask yourselves what is the practical good to come of this, is it going to cure clearance evils, is it going to cure the problems of distribution, is it going to do anything to ruin these companies, forcing them to sell their theatres to people who never buy them, unless they can tie up with contracts for exhibition on any fair terms? What is the good of it? If you find, as we think you will not, but as we concede you may, that in this area or in that, either geographical or industrywise there is some

evil to be corrected, correct it. Correct it directly by the power of this Court. But when my friend Mr. Davis said yesterday in answer to that motion to intervene of that Civil Liberties Union, that the Attorney General represented the public here, the thought flashed across my mind that in a very real sense, your Honors, we represent the public here. We know the public. We have served the public. And I leave this case for evidence with your Honors with the assurance (205)

assurance that as surely as I stand here no decree of a court would ever work more irreparable public injury than if you yielded to the wiles of the Government's proclamations based on this paper case.

DEFENDANT COLUMBIA'S OPENING

Mr. Frohlich: May it please the Court, I represent the Columbia Pictures Corporation and a number of subsidiaries which I shall refer to throughout as Columbia. Columbia has a unique position in this suit, because it owns no theatres. It has never owned a theatre and never proposes to own a theatre. There is no need for going into the genealogy of Columbia. It is a producing company. It came along in 1920 on a shoestring, and by the genius, the ability and the industry of its executives it found its place in the sun and embarked upon an activity that has been successful for over twenty years.

It first did nothing but produce pictures. And it found out after a few years that if any company in this industry proposes to produce pictures in quantity it must acquire a distributing organization. There is no such thing as producing pictures in quantity without your own distributing organization. In the old days, when Columbia was in its infancy the practice was to sell your pictures by state rights. There were men and corporations who divided up territory

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between themselves; they purchased your picture for X dollars; and if you were very fortunate you could get the balance of your purchase price after the picture was shown. There was a group of them down on 45th Street, they occupied the whole building, which was known as the House of Forty Thieves. That is the way the distribution of pictures was being done in the old days, and necessity and business requirements compelled Columbia, as it had compelled all these other companies, to finance itself and to open its own distributing organization. And it did so in 1929. It opened up thirty-odd exchanges throughout the country, hired exchange managers, salesmen, and embarked upon the distribution of these pictures.

It today is engaged in the production and distribution of its pictures and nothing more. And when the Government brought this suit in 1938 there was no doubt that the Government intended to seize the entire industry and reorganize it upon its own conception of what should be done. It brought the suit against eight defendants, five defendants who owned theatres, three who did not. For some reason that I can't understand, it excluded two other companies that, like Columbia, also had their own distributing organizations. It excluded all independents, although for many years there have been important and successful independent producers in America. Sam Goldwyn has been nothing more

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than an independent producer, distributing one year through one organization, one year through another, and a producer of marvelous pictures. Selznick is another. Chapman is another. I could give you names here by the dozen. No one was brought in but these eight companies.

Well, perhaps the Government needed these eight companies because the complaint as originally drawn was most comprehensive. It alleged a monopoly in production, in distribution and in exhibition. And if your Honors will be good enough to look at page 61 and page 75 of the amended

bill of complaint you will find those pages replete with allegations of monopoly in production and distribution.

Mr. Wright was asked yesterday twice whether he proposes to pursue those allegations in this case, and he was silent. If I can take that silence on Mr. Wright's part as evidence that he will produce nothing in this case on the question of monopoly in production or monopoly in distribution, then why, I ask, is Columbia Pictures in this case? Why is the United Artists in this case or the Universal, three companies that own no theatres?

Even under the complaint as drawn there was no attempt to allege a monopoly against Columbia in production. The charge was that Columbia, a reluctant conspirator, had lent itself to the other defendants in enabling them to carry out a monopoly in production. But that is out of the case now. (208)

There is no claim here, as I see it, of monopoly in production, nor is there any claim of monopoly in distribution. So, so far as Columbia is concerned this company is forced to come into court and go through the expense and burden of a long trial, when the opening statement of counsel and the trial brief of the Government clearly indicate that there is nothing on which Columbia can be held.

Now, Judge Hand yesterday asked Mr. Wright, What have you got against Columbia here? And he was told there were some contracts that were illegal. Well, let us see from the Government's own documents what is alleged to be illegal on the part of Columbia. The Government in its trial brief, which apparently has completely abandoned the complaint, lays a great deal of stress and importance on this schedule that Mr. Davis picked apart yesterday on pages 17, 18 and 19. And that schedule purports to show that in 73 large cities in the United States of over 100,000 in population, these defendants in the years 1943 and 1944 rented their pictures for the most part to each other, to so-called affiliated theatres, theatres owned by the five theatre-owning corporations.

Now, if we are going to have a trial by statistics, it seems elementary to me that we ought to have a trial by honest statistics, and this schedule which was very artfully drawn purported to show that a large percentage of Columbia pictures (209)

were rented to affiliates, thereby proving, according to the Government's theory, that Columbia was a co-conspirator and had lent itself to whatever conspiracy it proposed to prove.

Well, to begin with, the Government's arithmetic is bad. It computed the number of instances where Columbia had sold to the independents in those 73 cities as 19. Actually there are 22. And in one instance it had sold to both an affiliate and to an independent, supplied its product. Actually there were 23 instances out of 73 in these large cities—and mind you they are large theatres, large seating capacity—and Columbia is entitled to get whatever revenue it can from its pictures, the best revenue it can—about 31½ per cent. But that is not the truth in this statistic. Here is what actually happens. In these 73 cities 33 are closed cities. We call them closed—and your Honors will get that definition throughout the trial—a closed town, a closed situation, because the affiliated company's theatres are the only first-run theatres in those cities. I have either got to show my picture in an affiliated theatre in those 33 cities or I can't show it at all as a first-run. The other remaining 40 cities are competitive. There is an independent and there is an affiliate theatre. I have my choice.

Now, what did Columbia do? Those 23 instances that (210)

I talked about were in the 40 cities where the showing is competitive; so out of 40 competitive cities this company showed its product in 23, or 57½ per cent. Now, that is far from a showing of conspiracy. If Columbia is to be charged with being a conspirator on the brief of the Government certainly a showing that it exhibits 57½ per cent of its product in these competitive situations, where it should

get the largest revenue, has great significance, because it shows that Columbia was not aligned with any group; it was free to do as it pleased; if it preferred to sell the independent, it did so; and it did do so, and the Government's figures showed that it did do so.

Judge Goddard: Mr. Frohlich, what do you mean by "independent" here?

Mr. Frohlich: Well, as I gather in this case—the Government may mean one thing and I may mean another—but I am using the word independent in contradistinction to a theatre which is owned by one of the five defendants in this case. Any theatre not owned by them I have to call an independent, and it is an independent. Call it what you will. I call it independent. But the point is that theatres which are owned by people not interested in this litigation, no defendants here, these theatres have been given opportunity to receive pictures from Columbia.

So far from showing Columbia to be a conspirator, the (211)

Government's trial brief shows that Columbia has behaved as well as any company in this business has behaved, and the proof will bear that out.

And I will show you how the proof will bear that out, because this is not the first time that Columbia has been subject to trial by the Government. Your Honors will recall that Mr. Wright in his opening statement pointed out that when this suit was brought in 1938 three companion suits were brought against large circuits of exhibitors. One was down in Tennessee against the Crescent Circuit; one was in Oklahoma City against the Griffith Circuit, and one was in Buffalo against the Schine Circuit.

Now, those cases came to trial. The Crescent case was tried before Judge Davies in Nashville in the Summer of 1941. Columbia was one of the defendants in that case. And after the consent decree had been signed, the Government was kind enough to eliminate the five theatre-owning defendants out of that case. They were in all the cases; all eight were in

all these cases. So there remained no one but these three so-called minor defendants, Columbia, Universal and United Artists and the local circuit.

Now, in the Crescent case there was proof taken the entire Summer, and Columbia was dismissed at the end of the Government's suit, and Judge Davies in his findings said some very interesting things about Columbia that I think (212)

this Court ought to know, because so far as Columbia is concerned the picture is a healthy one and has been throughout these twenty years, and now has received judicial sanction, and I think it will have some bearing upon Columbia in this case.

And Judge Davies said in the Crescent towns, including towns in which independent operators were in competition with some of the independent exhibitors that the defendant Columbia invariably leased its product to such independent exhibitors. And further on he finds: The course of conduct of the defendant Columbia during the period in question showed a willingness on the part of such defendant to rent or lease its product freely to independent exhibitors in all of the Crescent towns, including all competitive towns in the States of Tennessee, Alabama, Kentucky, Arkansas, Mississippi and North Carolina upon a fair competitive basis as between independent exhibitors themselves and independent exhibitors and defendant exhibitors.

Here is a case where the court took testimony for an entire Summer and came to the conclusion that Columbia's treatment of exhibitors throughout these States mentioned, at least, was fair and honorable and decent.

Now, the Griffith case has been tried. The Government of its own volition dismissed Columbia, United Artists and Universal out of that case. The Griffith case is still being (213) tried.

In the Schine case Columbia was dismissed by the Government's own volition, its own motion, dismissed out of that case; and we must assume, your Honors, that if the Govern-

ment dismissed Columbia, Universal and United Artists out of those remaining two suits, it could reasonably anticipate that the same result might take place there as took place in Tennessee.

Now, so far as the figures are concerned on income, I have obtained these figures for one year, 1943-1944, because Mr. Wright has said that in that year these defendants in their income from the leasing of product apparently got so much from the affiliated that surely there must be a conspiracy, and he is trying to have this Court draw that inference. Now let me give the actual figure in Columbia. Here in that season in 1943-1944 Columbia's domestic gross income was \$23,154,292. Almost 24 million dollars. Its income from all of the five theatre-owning defendants in this case was \$5,836,000, or about 25 per cent. Is that a showing of a conspirator? Is that a showing of a company brought in charged with a violation of the Sherman Act? I have never seen anything like it, and I am going to ask this Court at the proper time to dismiss Columbia out of this case, because no proof can be offered under the pleading, under the trial brief, and no proof can be offered that he has any force or probative value (214).

here to show that Columbia belongs in this case.

DEFENDANTS UNIVERSAL'S AND UNITED ARTISTS' OPENING.

Mr. Raftery: May it please your Honors, I want to speak for the remaining two defendants: As regards Universal, there have been some changes in the corporate structure since we were here in 1940; so in line with Mr. Wright's suggestion Mr. Schimel and Mr. Wright or his associates may sit down and straighten out the new names and the changes in the Universal defendants.

United Artists Corporation, the other defendant, remains the same corporatewise.

Following up what Mr. Frohlich has said, we do not know why we are here. In 1941 or 1940, at the time of the consent decree, we meant so little then to the Government that they went on with this elaborate consent decree and this arbitration system and all the other things and were very happy to leave us out of it. They did, however, keep us in Nashville for eight weeks, and at the close of the trial, as Mr. Frohlich says, Columbia was let out; Universal was let out; United Artists was held in in Rogersville, Tennessee, a town of 1600 population, over some pictures that involved, I think, exactly \$72. They were held in in Athens, Alabama, on a transaction that involved a theatre that had a large (215)

pot-belly stove at the end of it and it ran like a bowling alley back and forth in a store. The Court did not even assess costs against United Artists. So that entire litigation resulted when the Schine case came on, they dismissed at the opening, and then they dismissed out in Oklahoma, the remaining case.

Now, what is the situation regarding these two defendants? Mr. Wright in his opening stressed divorcement. Your Honor asked him the question as to what he had against the other three defendants. And he stated some illegal contracts. In his trial brief he refers to us once on page 8. He then goes on to talk about the type of exhibition license agreement that is used by all the companies. That is, that we license pictures to theatres; we receive a percentage of the gross or a flat rental; we give clearance; we license a specific run. In other words, that all eight companies, and the companies that Mr. Frohlich referred to who are not parties here—and I presume he referred to Republic and to Monogram and to P.R.C., three other national distributors—license pictures the same way.

Now, the licensing of pictures is show business. You are dealing with an article that the public taste and fancy ultimately is going to determine as to its success. There is no difference today in the licensing of a motion picture than

there was in the handling of legitimate shows in the days
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when all of us knew the theater a little better. When the Ziegfeld Follies played on 42nd Street where you now have flea circuses and a few other things, Mr. Ziegfeld would book his show into the New Amsterdam Theatre; he would possibly receive 75 per cent of the gross receipts; he would determine the admission price that all of us paid to go in that theatre, whether we sat on the lower floor or sat up on the top balcony. On Saturday night he took out of the box office his percentage of the receipts; he determined the advertising that appeared in the theatres; he was a real joint venturer with the theatre owner in the operation of that theatre while his play was at that theatre, and the same with every other play in the City of New York. That play played in no other theatre in America while it played at that particular theatre. Mr. Seymour hinted yesterday it might go out on the road. Well, it might go out with the same cast, or possible Will Rogers' horse could not travel and would not go with it. Its admission prices were determined when they ultimately got out there. Its advertising was handled, and ultimately the percentage of the receipts came. Of course, it might strike a theatre somewhere along the line where the owner of the theatre would say, instead of giving him his 80 per cent which he got on the road, I will give you \$5000 for the two performances Wednesday matinees and evening flat.

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Now, what happens with a picture? Now, all this comes to whatever charges there are of price-fixing and everything else. Mr. Ziegfeld took the entire risk of loss in the production of that play. David O. Selznick takes the entire risk of loss when he produces a picture. Universal takes the entire risk of loss when it produces a picture. So when the picture is available, if you have got three or four million dollars invested, or got a million dollars invested, you go out and book your picture in exactly the same way. These exhibitors that own theatres, whether they are the big five or some of the group that belong to some of the trade associa-

tions that I have seen representatives of sitting in the back, they not one of them assume any part of the risk of loss in the manufacture of that picture.

So what happens? You have a distributing organization. And that distributing organization, once it gets the print starts with that first run whether it is New York or Minneapolis or San Diego, or wherever it opens. Now, you just can't let that picture go into that theatre. You have got to put it in, and you have got to service that picture from the day it gets in there until you are able to take your percentage out of the box office at the close of the engagement.

The distributor has an elaborate advertising department.
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It has road men, field men that go out and publicize the picture in the locality where the picture shows. It contributes by contract to the advertising of the particular engagement; and as Judge Proskauer said, you can't live without this first run. That is where you get back the big revenue that makes it possible to spend the amount of money to give quality at the theatres.

Now, United Artists right now has two pictures coming in, each with a negative cost in excess of four million dollars. You just can't by any rule of thumb send those pictures out. You have got to send them out the same way you send a road show, the same way you send any attraction, whether Barnum & Bailey Circus, or anything that caters to the public taste and fancy. We are dealing with one of the most perishable items of merchandise known, and that is the type of merchandise that you have got to put out to the public, and you have got to advertise; you have got to stay with it; you have got to control, and your control is to see the proper advertising in the newspapers, the proper billboards, the proper ballyhoo in order to bring out your percentage. And what good is your percentage if you don't have a box office price that the picture is going to be exhibited at? For instance, *Gone With The Wind* was mentioned a half a dozen times today. When that picture went out it had a box office price of \$1.10, which was a higher price than the prices before.

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The same thing applied in the vaudeville days. In vaudeville you had the B. F. Keith theatres which showed the best vaudeville. The vaudeville that was shown at the Palace Theatre had the same exclusivity that has resulted in run, in clearance, in every practice that is found in these contracts that Mr. Wright says are predatory practices.

Now, what about United Artists and Universal? Each company is entirely different from the other. United Artists Corporation produces no pictures. It is a mere distributing organization. United Artists Corporation founded in 1919 has never produced a picture. It is a mere distributing organization and has offices throughout the world and is engaged in that practice everywhere. When I was down here with Judge Goddard in 1940 we had 13 producers. Today we have 19. In addition to taking on a great deal of British product, which is now playing at the Winter Garden on Broadway, and which up until two weeks ago was a legitimate theatre and is now a motion picture house again.

The United Artists Corporation under contracts that have all been submitted to Mr. Wright does not control the product it handles for the 19 producers except in part. We solicit one of Mr. Seymour's client's theatres. We bring the contract back. We then have to submit it to the owner of the picture (220)

for his approval or rejection. All our pictures are sold individually one at a time, and each picture is owned, as a rule, by a different producer at the time solicited. Very rarely do we have two pictures with one producer to offer to any customer. So we have instead of any suggestion of conspiracy, you have a theatre owner, a middle man distributor, and in the last analysis, the producer. The owner of the picture decides whether he wants it to play in that theatre or not. There are 19 of those producers at the present time, and they have 19 representatives, and we have to go through that formula in handling that particular type of business.

United Artists, so as to have the record clear, does own some stock as an investment in one theatre in San Francisco

and two in Los Angeles. But the independent—and I am using “independent” in the Frohlich sense—that operates those theatres has a contract where we have nothing to say about the management, the booking, the operation, and further, there is no obligation on his part to play our pictures. It is an investment.

Universal, on the other hand, is an entirely different type of distributor. In these mechanical things that I have talked about—that is, making the pictures and the prints and the selling and whatnot—there are many things in common of necessity, just like we have a number of things in common (221)

with the other defendants here. That company is the oldest defendant here. It was in the theatre business once about 1925. We went into greater detail about it on the other hearing. It got out of the theatre business in 1929. It had the same management from 1912 to 1938 and since 1938 it has had an entirely new management. That company either produces or has produced for it by independent producers—again no affiliation—a group of pictures every year. Since 1938 its success has been phenomenal. It had very, very trying times before 1938 but under the new management it has prospered and continued to prosper.

As regards these charts that are to be offered, I say you can prove anything you want to prove with charts in this lawsuit; but the one thing that is fundamental in this business is the quality of the merchandise you are handling. I remember at a meeting where one man said there is nothing in the motion picture business that can't be cured by good pictures.

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I won't go as far as Judge Proskauer to admit that Universal picture was the worst picture ever made. I think there have been many more just as bad. However, there is another chart he brought up on United Artists. On one side he had a very successful picture and on the other he had another picture, I forget the name, something about an elephant, but there it was and he put them both on the same

chart. I guarantee that we can take that chart and we can offer it for some purpose that will be very helpful to every defendant in this lawsuit.

The charts prove nothing.

You will remember, particularly Judge Goddard, on the day the consent decree was offered here, practically all the independent exhibitors were here in one form or another, protesting against it. They were not interested in clearance, they were not interested in run. It all went back to the same bugaboo we have heard from the beginning. We start out to sell the pictures to get the highest prices that we can for our commodity. They start in to buy them as cheaply as possible. They also want to be relieved of the obligation of playing what they think are bad pictures, and they want to play only the good pictures on terms that they like.

If this Court, or some omnipotent court, could solve that problem, then instead of them making a lot of money as they are today, they would all make a lot of money quicker (223)

and all the producers would go broke sooner. That is the real, underlying economical principle that is behind this flood of complaints that I know Mr. Wright gets from the disgruntled in the industry.

I read in some paper here of the industry not long ago that they had a meeting of one of the exhibitor associations. They said, "Let us definitely go on record and not pay percentage anymore to any of these distributors."

Again, and finally, this is the position that we are in: We are brought down here to court; we have had to prepare information that high (indicating), which we have done, and we didn't do it because of anything in the decree, as Mr. Davis said yesterday. We do take a bow for having done it. We did it without any compulsion. We have tried to cooperate with the Government in every respect, yet I am very much afraid that we will have to sit here for weeks and weeks without being mentioned even as defendants. We are not interested in the divorcement issue, and the Government does not want any divorcement against us.

Now, I know it is a late date, but if there could have been some kind of a severance or agreement worked out so that the group here would only be required to come down here on the one day when they intend to put in their case against us, for about 30 minutes, it would be a tremendous help to us in this instance.

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We sell the market as we find it. Mr. Frohlich said, we sell these theatres because they are closed and the only customers. We sell every theatre we can possibly sell, whether it is affiliated or unaffiliated. That is the sole crime the Government charges us with here. If we had refused to sell them we would have been in conspiracy of some kind; having sold them, we are condemned.

We submit that the Government should be required, before they go into their proof in this case, to state the issues as far as the three non-owning-theatre members are concerned. If they will give us those issues, which they never have, not even in this trial, we will meet them and gladly.

Judge Hand: Mr. Wright, what do you say about these three independents? It seems to me it is pretty slim. That is just my own individual attitude in the matter without much information, I admit.

Mr. Wright: If the Court please, they are unquestionably in a dual position in the suit, where they do exactly as Mr. Raftery says, they sell this market, which we say is a monopolistically controlled one, as they find it. However, in the course of selling that market, they have made agreements with the affiliated companies which we say control that market, which are, in and of themselves, we say, an unreasonable restraint of trade. And on the basis of those

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dealings they are clearly not entitled to a clean bill of health in the case, that is, they have persistently violated the Sherman Act in our view in the course of their dealings with these other defendants, and that, of course, we propose to show by showing what that course of dealing was over a

period of time and samples of the agreements by which it was carried out.

I might say that none of them is quite as lily white as this presentation here would have led you to believe. In the Goldman case, for example, there is what Mr. Frohlich referred to as a closed market, all the first-run theatres in Philadelphia being owned by Warner. What happened when somebody tried to come into that closed market with an independent theatre suitable for first-run theatre? Did United Artists or Universal or Columbia sell it? No, they refused, along with the other five theatre-owning distributors, to make any first class films available for his theatre in exactly the same way that the five theatre-owning distributors did. And it is on the basis of conduct of that sort that they clearly cannot be split out of the case prior to a full hearing, if the ultimate relief that is granted in the case is to give proper regard to all of the elements in the industry.

Judge Hand: We will take a recess until 2.10.

Mr. Proskauer: Could we take up with the Court this suggestion of—

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Mr. Wright: I think it is a little premature. Wait until we get into our presentation.

Mr. Proskauer: Pardon me, your Honor.

Judge Goddard: What is that? Is that anything for us?

Mr. Proskauer: There has been some talk between Government counsel and ourselves about advising the Court that we would probably unite in asking for a recess of the trial after the Government's direct case is in, and I was asking my distinguished adversary whether he wished to bring that subject to the Court's attention now.

Mr. Wright: I think it is a little premature at this time, before we actually outline our presentation.

(Recess to 2.10 o'clock p.m.)

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AFTERNOON SESSION

Mr. Wright: If the Court please, before actually offering the documents I would like to outline how I think we can best use this list of exhibits.

Do each of your Honors have your copy there? If not, I have some extra ones here.

Mr. Davis: I can't hear you, Mr. Wright, I am sorry.

Mr. Wright: I will stand over here.

The caption on the document is "Government's Exhibits for Identification."

Judge Hand: I see.

Mr. Wright: If the Court please, that document that you have in your hand is a printed copy of the mimeographed list that was served on September 1st in accordance with the arrangement that was made at the pretrial hearing in July with some supplementary material added. That is, the numbers 1 through 323 are those which were on the mimeographed list, and then you will note that a supplemental list has been added of material which was identified after the September list was served.

Now, in connection with physically incorporating this material in the record, I had suggested by letter to counsel for the defendants that in so far as material furnished by them was concerned that the most expeditious way would be
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for each of them to have a copy of the documents referred to which represented a document produced by them for marking and physical incorporation in the record, so that they would be satisfied that the copy that went in was a true copy of the record in question. And as I see it, the actual marking of the documents in inclusion in the record need not be done in the presence of the Court at all. That would largely be, I suppose, a clerical task that can be performed outside the courtroom. As I see it, the function that will have to be done here is the actual ruling on the admissibility of the exhibits

as they are outlined. We, of course, have brought down copies of all the exhibits referred to, and if there is a controversy that arises as to the accuracy of our description here, or as to what is in the exhibit, of course, they are here and available for the Court's examination. But it is not my intention to hand these up back and forth, document by document, because I think this list does contain a sufficiently complete description to enable the Court to rule from the list itself.

Now, in order that the list shall be most useful to the Court and to the defendants as an index and digest of the Government's case, I think the numbering that appears on the list here should be preserved. That is, when the document goes in evidence, simply leave the same number on it and strike off the marks for identification, so that this will (229)

continue to be an accurate index and list of the Government's exhibits in evidence. In the event that anything is withdrawn or excluded, it can simply be marked off here accordingly, and it may leave some gaps in numbering, but I think that we will still have a much more accurate and convenient record of identification if it is done that way, rather than trying to fill in the gaps by re-numbering subsequent exhibits. And I should like to proceed in that fashion if that is agreeable to the Court.

Mr. Davis: If the Court please, I have every sympathy with Mr. Wright's desire to expedite the manner in which he introduces his proof. I do not think I understand what it is he wants to do. Exhibit No. 6 on his list here, for instance, is interrogatory 50-A addressed to Loew's. Now, if that is to be in evidence I think it must be put in the record right now in the presence of the Court. I do not understand that we propose to build up out of the presence of the Court a synopsis of exhibits which the Court will then treat as having been introduced before it. It seems to me clearly the basis for anything he wants to extract from these interrogatories is the tender of the interrogatory and the answer to it, which,

of course, pro tanto, constitute an admission on the part of the answering defendant, and is admissible in evidence against it. But we shall do very much, I think, if we will proceed in the customary order than if we try to short-circuit it. (230)

Mr. Wright: I was not suggesting any short circuiting in the offering. I think what I am trying to do will be perfectly clear as soon as I start to do it.

We shall follow the order of the outline in my opening statement of offering the documents, and, for example, we shall first offer now the documents that are identified on this list as answers to interrogatories by the defendants and their admissions of fact. Those are described on the list here at pages 1 through 97, and the numbers that they carry for identification are 6 through 150 inclusive. I shall, of course, offer these at this time, and I assume that the court will make a ruling on each of the identified exhibits.

All that I am merely suggesting is that, in order to make the ruling, it is not necessary to pass the exhibits back and forth physically at this time or even to have them physically marked simultaneously with the ruling; that that may be done outside the presence of the court.

Judge Hand: Why isn't that so?

Mr. Davis: I do not see that that is possible at all. I think the exhibit has to be separately offered and has to be separately marked. If there is an objection it will have to be ruled on as such. I do not think the court, if an exhibit be offered before it, which bore the number 9 and which pur- (231)

ported to be a list of Paramount theatres, would, in such a contingency, rule thus and thus. I do not know any way in the world in which these exhibits can be made part of the record unless they are offered seriatim; not that "I offer exhibits identified as number 6 and number 123," but offer it seriatim. It may not require any of this deprecated passing backwards and forwards. We won't ask counsel to turn around and show them to us one by one. I really don't know

any way to try a documentary case except to tender the document and have it marked in or out of the case, as the case may be.

Judge Wright: Have the defendants copies of all these?

Mr. Caskey; No, sir.

Mr. Wright: Now just a minute. As far as the interrogatory answers that I have just offered, the defendants all have copies of those, because those are copies of answers that they themselves furnished.

Mr. Davis: Wait a moment. You mean they have answers of their individual responses?

Mr. Wright: Yes.

Mr. Davis: We have no answers of each others responses, which is what I take it Mr. Caskey means.

Mr. Caskey: That is correct.

(232)

Mr. Wright: As to that, that is true.

Mr. Caskey: We have never seen them.

Mr. Wright: I think the thing will shake itself as we actually proceed.

Judge Hand: You proceed.

Mr. Wright: With reference to item marked number 6 for identification, listed on the first page, and number 7, those may be marked as withdrawn because we find on checking that they are duplicated in Exhibit 48, that is, they appear later on as a part of another exhibit. So 6 and 7 may be marked withdrawn.

Mr. Davis: Are they withdrawn or simply not offered?

Mr. Wright: That is a distinction that escaped me. They are both, I should say; they are withdrawn and not offered.

Exhibits 8 and 9 we offer in evidence. What they are is apparent on the description there.

Mr. Caskey: May we see them, please?

Mr. Raftery: May it please the Court, when Mr. Wright says they are offered, they are offered against which defendants?

Judge Hand: They are offered against which defendants?

(233)

Mr. Wright: Today, if the Court please, everything that we offer will be offered against all defendants. Of course its admissibility as to those who did not furnish it will depend, I suppose, on an ultimate decision as to whether or not there is a conspiracy, but the only determination that needs to be made now is whether it is admissible against anybody for any purpose.

Mr. Seymour: What about exhibit 1? I assume that will be the first one offered.

Mr. Wright: I said in my opening statement we would proceed to offer first the interrogatory answers and the admissions of fact, and that is why we are proceeding in this way.

Mr. Raftery: On behalf of the defendants Universal group and United Artists Corporation, we object to the offer just made as not binding on either.

Mr. Frohlich: The same objection is made with respect to Columbia.

Mr. Caskey: May we have an opportunity to examine them?

Mr. Wright: Certainly. Examine them at any time.

The Court (Judge Hand): We will admit it and give you an exception. Of course, if it is not connected, if it really is not connected in the end, there is no proof of this conspiracy, why, it won't count.

(234)

Mr. Proskauer: May it be understood—

Judge Hand: We are not really going to have all these different objections. It seems to me it would be intolerable.

Mr. Proskauer: In line with what your Honor is saying, may it be understood that these objections inure to the benefit of all the defendants, so that we won't have to repeat them.

The Court (Judge Hand): I don't see why not.

Mr. Proskauer: And that we are reserving our objection to all of these things on the fundamental ground that there is no proof of conspiracy which makes them relevant or compe-

tent against any other defendant than the one who is claimed to have made the admission.

Judge Hand: Yes.

Mr. Proskauer: And in that connection may I also suggest to your Honor that, of course, the alleged description of these interrogatories appearing in the copies, "Exhibits for Identification," we do not acquiesce in. They are not the exhibits themselves. They contain language of characterization and I should think we ought to be entitled to have it clearly understood that what is being offered is Interrogatory 50-A and Interrogatory 52.

Mr. Wright: That is quite right.
(235)

Mr. Proskauer: And nothing else.

Judge Hand: That is true, of course.

Mr. Wright: The only purpose of the description is for identification only. It obviously does not constitute evidence of any kind in itself.

(Government's Exhibits 8 and 9 for identification received in evidence.)

Mr. Wright: Next, we shall withdraw and not offer Exhibits 10 and 11, as they are contained in Exhibit 118 for identification.

We shall offer Exhibits Nos. 12 and 13 for identification, the National Theatres lists.

Mr. Caskey: With respect to Exhibit 19 for identification, a substitute copy has been submitted to counsel, showing the current position of theatres operated by National Theatres Corporation, and we think that should be offered either with the proposed exhibit or in substitution therefor.

Mr. Wright: In due course, the current list will be offered. This answer gives the picture as it was in 1939. We are offering both.

Judge Hand: Overruled. Exception.

Mr. Raftery: Mr. Wright, that is 12 and 13?

Mr. Wright: 12 and 13.

Mr. Davis: May I ask whether the stenographer is marking these?
(236)

Mr. Wright: They are already labeled for identification.

Mr. Davis: No, but they do not bear the stamp of the clerk as having been made a part of the record.

Mr. Wright: The clerk, I suppose, will stamp them as they are laid out here.

Mr. Caskey: If your Honors please; I should like to be heard on this matter. We have been unsuccessful litigants in a case in Chicago in which a controversy arose as to whether or not the document had been admitted into evidence and I feel we would not discharge our duty to our client unless the particular and precise document that is to go into evidence is currently marked by the clerk or by the stenographer, so that there can be no question as to what is in this record and what is not in it; and we are interested in saving time, but we are also interested in the proper representation of our client and in making a record here that we can understand. I respectfully request that these documents to go into evidence be marked.

Mr. Wright: They all have the numbers marked on there and I think the only further marking that needs to be done is the striking off of the words "for identification."

(237)

Mr. Caskey: They should certainly bear some other symbol than that.

Mr. Wright: We shall withdraw Exhibits 14 and 15.

(Government's Exhibits 12 and 13 for identification received in evidence.)

Mr. Wright: We shall withdraw Exhibits 14 and 15 as they are duplicates contained in Exhibit No. 100 for identification, and will also withdraw Exhibits 16 and 17 because they are contained in Exhibit 97 for identification; and we shall withdraw Exhibits 18 and 19 because they are contained in Exhibit 88 for identification.

And we shall next offer the exhibit number—

Judge Goddard: How many has the clerk marked?

Judge Hand: He has marked only four.

The Clerk: That is all that were admitted.

Mr. Wright: Four are offered and in evidence. We shall next offer Exhibit No. 20 for identification, which is described there on pages 5 and 6, interrogatory answers of Fox, numbered 1 to 20 inclusive, filed in 1939.

Mr. Caskey: Now, with respect to this offer, since the date of the compilation of that answer, the certificate of incorporation has been amended so as to restate the purposes of the corporation, and I hand to Mr. Wright an amended answer and ask that it either be marked as a part of the (238) exhibit or in substitution for it.

Mr. Wright: I would suggest that these two sheets that Mr. Caskey handed me—

Mr. Davis: Mr. Wright, we cannot hear a word you say.

Mr. Wright: I think the best thing to do with these two sheets that Mr. Caskey has handed me is to merely mark them Exhibit 20-A for identification and to have them offered and admitted with 20.

Judge Bright: Why mark them for identification?

Mr. Wright: Well, in evidence as 20-A. Then I suppose a note should be made on the list as to what 20-A is, amended certificate.

(Government's Exhibit 20 and 20-A for identification received in evidence.)

Judge Hand: What is it, an amended answer?

Mr. Wright: it is simply an amendment to the certificate. The charter is only a part of the interrogatory answers that are contained in Exhibit 20.

Mr. Caskey: Mr. Wright, how much have you offered, all of 20?

Mr. Wright: Yes.

Mr. Caskey: Is it your purpose that twenty-four documents are to have the same exhibit number?

Mr. Wright: They were given the one exhibit number (239)

because they were all given to us as one document. We have marked the interrogatory answers as we found them in this documentary form in which they were filed. That is why those twenty-four answers are given one number, otherwise it would mean tearing the answer apart.

Mr. Davis: They ought to be physically affixed to each other.

Mr. Wright: They are physically affixed.

Mr. Caskey: In that connection, then, we have what we understood to be in pursuance of the Government's request, prepared supplemental answers to these interrogatories, bringing them down to date. I had not anticipated that they were to be offered in bulk, but if they are, we are prepared to hand to counsel the amended answers in bulk.

Mr. Wright: I think we have on this list, if the Court please, both the 1939 answers and then later the 1945 supplementary or amended answers, and I think we can take care of that at the proper time.

Mr. Caskey: This is different material.

Judge Hand: They are under these sub-numbers?

Mr. Wright: They supplement, I take it, the information that was contained in this Exhibit 20 with reference to the (240)

matters covered by these interrogatory numbers here. That information was asked for in 1939.

Judge Hand: You mean they are on this page 113 or 114?

Mr. Wright: Oh, no.

The Court: On that list, where are they?

Mr. Wright: If the Court please, those 1945 answers occur later on, in the list. We grouped in the list for convenience all of the 1939 answers first. Then the 1945 answers appear in the list substantially further along. I don't think it makes any difference whether or not these 1945 supplements are offered directly following this material or at a later time as long as they are clearly identified.

Judge Hand: You mean they appear on page 10?

Mr. Wright: Page 10 contains the 1945 answers of Fox as to certain distribution data, and then there is an admission of facts but then over on page 14—

Mr. Caskey: Oh, Mr. Wright, you could not have listed it because you never had it. We haven't been able to get it ready over the week-end.

Mr. Wright: Quite obviously it is not on our list then. We did have answers on the National Theatres organization listed on page 14 there.

Judge Hand: It is going to be bad for the stenographer (241)

to be taking down all these current remarks here that are qualified by something else. Why don't you straighten out your record?

Mr. Wright: I think the best way to straighten out the record would then be to have these documents he has just handed me marked, and I will read the description into the record as they are marked. This 20-B—

Mr. Davis: You have offered 20, and 20 has been marked?

Mr. Wright: 20 and 20-A have been offered and received. 20-B—

Judge Hand: These are to be 20-B?

Mr. Wright: I was going to mark them as they are physically separated here, giving each one a separate designation. 20-B is a supplemental answer dated September 27, 1945, by Fox to Interrogatory 2.

(Marked Government's Exhibit 20-B in evidence.)

Mr. Wright: And 20-C is a two-sheet schedule which supplements the Fox answer to Interrogatory 2.

(Marked Government's Exhibit 20-C in evidence.)

Mr. Wright: And 20-D is a three-page supplement dated September 27, 1945, by Fox to Interrogatory No. 3.

(Marked Government's Exhibit 20-D in evidence.)

Mr. Wright: Then E will be a two-page supplement bearing the same date, by Fox, to Interrogatory No. 4.

(Marked Government's Exhibit 20-E in evidence.)

Mr. Wright: F is a four-page supplement filed by Fox, bearing the same date, to Interrogatories 5, 6 and 7.

(Marked Government's Exhibit 20-F in evidence.)

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Mr. Wright: And 20-G is a supplement bearing the same date by Fox covering interrogatories 8, 9, 10 and 11.

(Marked Government's Exhibit 20-G.)

Mr. Wright: 20-H will be a supplement consisting of two pages by Fox to interrogatories 12, 13 and 14, same date.

(Marked Government's Exhibit 20-H.)

Mr. Wright: 20-I is a two-page supplement by Fox of the same date to interrogatories 15 and 16.

(Marked Government's Exhibit 20-I.)

Mr. Wright: 20-J will be a single-page supplement, same party, same date, to interrogatory 17.

(Marked Government's Exhibit 20-J.)

Mr. Wright: 20-K, a single-page supplement of the same party, the same date, to interrogatories 18 and 19.

(Marked Government's Exhibit 20-K.)

Mr. Wright: 20-L is a two-page supplement by the same party, same date, to interrogatories 20, 21, 22, 23 and 24.

(Marked Government's Exhibit 20-L.)

Mr. Wright: Now, the next item on the list there, 25, 26 and 27, we shall not offer at this time because I think most of the data that is contained there on which we will need to rely is reflected in later supplemental theatre lists that were

filed in 1945. You will note that what this is is a series of (243) monthly reports indicating changes, and I do not think it is necessary to show all the monthly changes in the record. We will simply show the situation at the end of the period and at the beginning.

Judge Hand: What are these, 25, 26, 27 and 28?

Mr. Wright: Those are monthly reports on the Fox Theatre position which were submitted pursuant to the consent decree which showed the changes monthly. I say, I do not think it is necessary to encumber the record with the monthly changes because we do have a 1945 list which shows the net results, so I am not offering those at this time. There may be a specific report or so that we might wish to offer later on.

Mr. Caskey: I think your Honor said 28 also. I think the documents not offered only go through 27.

Mr. Wright: That is right, 25, 26 and 27 are the ones not offered.

We will now offer 28 and 29, which are described at the top of the page there.

Mr. Caskey: I have with respect to 28 and 29 the supplemental answers and the same information for the years since 1939.

Mr. Wright: I do not recall that we asked for those.

Judge Hand: 28 is admitted and 29 is admitted.

(Government's Exhibits 28 and 29 for identification received in evidence.)

(244)

Mr. Wright: I take it that this is material to the defendants' desire to have in the record at some point anyway, and if they do we might as well put it in now as far as I am concerned.

Mr. Proskauer: Do not attribute that desire to me.

Mr. Davis: Or me.

Mr. Wright: I think it would be best to defer offering this material that has just been handed to us because it may be that we may not want to use it.

Mr. Caskey: The point, your Honor, is that he is offering answer to interrogatory 25 which shows certain data as to motion pictures produced from the years 1930-31 to 1937-38, and he terminates his offer of proof seven years ago. Now, if it has any relevancy at all, we think that at this time and in the same place in the record there should be evidence as to the relative cost of the pictures which have been produced during the last seven years.

Mr. Wright: If the defendants wish to put it in I will be glad to put it in here. It is simply a matter of convenience.

Judge Hand: Put it in.

Mr. Wright: These, I take it, Mr. Caskey, are supplements to 30, are they not, rather than 28 or 29?

Mr. Caskey: No, sir, they are exactly the same material (245)

as with respect to interrogatory No. 25—

Mr. Wright: 28 is the exhibit under discussion.

Mr. Caskey: That is right, feature pictures grouped into four categories by the years, showing the title, stars, and names of distributor.

Mr. Wright: All right. The Fox supplement to interrogatory No. 25 for the 1938-1939 season will be marked Exhibit 28-A.

(Marked Government's Exhibit 28-A.)

Mr. Wright: And for the 1939-1940 season it will be marked Exhibit 28-B.

(Marked Government's Exhibit 28-B.)

Mr. Wright: And for the 1940-1941 season, Exhibit 28-C.

(Marked Government's Exhibit 28-C.)

Mr. Wright: And for the 1941-1942 season, Exhibit 28-D.

(Marked Government's Exhibit 28-D.)

Mr. Wright: For the 1942-1943 season it will be marked Exhibit 28-E.

(Marked Government's Exhibit 28-E.)

Mr. Wright: And for the 1943-1944 season it will be marked Government's Exhibit 28-F.

(Marked Government's Exhibit 28-F.)

Mr. Wright: And for the 1944-1945 season—it seems to me we are getting into the future here—mark that 28-G.

(246)

(Marked Government's Exhibit 28-G.)

Mr. Wright: Then we will offer also 29, which is the answer of Movietone News, a Fox subsidiary.

Judge Bright: We have had marked 28 and 29 here.

Mr. Wright: 28 is the answer to that interrogatory 26 that was filed by Twentieth Century-Fox Film, the parent; and 29 is the answer to the same interrogatory filed by Movie-tone News, Inc., its wholly-owned subsidiary.

Judge Hand: You are marking these A, B, C, D and so on under 28, aren't you?

Mr. Wright: Those were the supplements,

Judge Hand: Yes, I know that.

Mr. Wright: But now I am back on the regular list here. 28-G was the last supplementary one.

Judge Hand: That is the last I have got.

Mr. Wright: Well, I am now offering 29, which is the answer of Fox Movietone News to interrogatory 26.

Judge Hand: You also offered 28¹, didn't you?

Mr. Wright: 28 itself, yes. That was offered and received.

Mr. Caskey: Mr. Wright, how do we distinguish between the two number 28's?

Mr. Wright: That really should not be. The 28¹ should appear only in the footnote there, and really not with the 29. I think that is an error in the way the list is set up. If you

(247)

will just strike out 28¹ I think you will solve the problem.

Mr. Caskey: Does 29 now consist of both the answers of Fox and the Movietone News showing the number of sound stages—

Mr. Wright: 28 is the answer of Fox to that—contains the answer of Fox to interrogatory No. 26; and 29 contains the answer of Movietone News to the same interrogatory.

Judge Hand: So 28¹ goes out, does it?

Mr. Wright: Yes. I think that notation there, although Fox's answer to 26 is included in 28.

Judge Hand: 29 is received.

(Government's Exhibit 29 for identification received in evidence.)

Mr. Wright: Next we will offer Exhibit 30 for identification; and I should say Exhibits 30 through 39 are all Fox's answers concerning distribution of Fox features filed in 1939, and we will offer those as a group.

Mr. Proskauer: May it please your Honors it is my desire to lodge special objection which will be typical to Exhibit 30. I am embarrassed by the offer of a lot of things together, but I am confining my attention for the moment to Exhibit 30. That purports to be a list of feature pictures distributed by Fox during the 1936-1937 season with total film rentals received and information about five pictures for Atlanta, Kansas City, Philadelphia and New York. (248)

I am objecting to that on the ground of irrelevancy as well as incompetency, as far as we are concerned. It is on that kind of isolated, unrelated information that these charts have been built up, and I am making the point substantively and not technically. A case cannot be built up by that process of selectivity and then base a lot of charts on that kind of partial information.

Judge Hand: Overruled.

Mr. Caskey: I press the objection with such ability as I have: These pictures and these cities were arbitrarily selected by the Government. As far as the reasons for the selection of the five pictures out of a list of 60 which we distributed that year we don't know. Nor do we know why they picked the four cities. But it must have been in the

hope that some picture would be developed out of that material which would then be said to be typical of the whole. We do not believe it is typical of the whole, and we think it should not be received without at least preliminary proof that it is.

Judge Hand: Overruled.

Mr. Davis: So that I may keep my notes correctly, do I understand that Mr. Wright is introducing as one exhibit what is identified on this list by identification 30 to 37?

Mr. Wright: No indeed, Mr. Davis. I merely offered 30 through 39 together, because they all are Fox's answer to the '39 interrogatories relating to the distribution of its pictures. They are separately numbered and will go in as separate exhibits.

Mr. Davis: I misunderstood you. I thought you were offering them in bulk. And they preserve, do they not, at the hands of the clerk the same numbers that they were given when marked for identification?

Mr. Wright: Precisely.

Mr. Proskauer: By confining my objection, as I did, to Exhibit 30, I hope it is clearly understood that I am not waiving it as to the remainder of these exhibits which Mr. Wright is offering in bulk. It goes to all of them.

(Government's Exhibits 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39 for identification received in evidence.)

Mr. Wright: Then we shall offer Nos. 40 and 41, 42 and 43, which are 1945 answers of Fox relating to the distribution of its films for the 1943-1944 season.

Mr. Caskey: I think we will make speed if we go a little slower. 40 is offered?

Mr. Wright: Yes.

Mr. Caskey: Now, there is no objection. But when it comes to 41 there is an objection.

Mr. Wright: Well, let us consider that separately. Then 40, I take it, is admitted.

Judge Hand: Yes.

(250)

(Government's Exhibit 40 for identification received in evidence.)

Mr. Wright: I offer 41.

Judge Hand: Now I understand that 30 to 40 inclusive are offered and we have admitted?

Mr. Wright: Yes.

Judge Hand: All right. Go ahead.

Mr. Wright: I am now offering 41, and Mr. Caskey wants to make an objection to that interrogatory.

Mr. Caskey: This is objected to on the ground that—I will state first what it is. This is a chart, a series of charts prepared at the Government's request showing the first-run exhibitors; there are separate sheets for each city in the United States having a population of 25,000 or more, showing with respect to one picture the first-run exhibition in all of those cities, one picture. Then with respect to a portion of the cities, the first and second runs. With respect to another group of cities, the first, second and third runs; and finally with respect to four cities, the first, second, third and fourth runs. Now, we apprehend that from this limited amount of material some inference of pattern of distribution of all of our pictures in the United States, the entire United States, will be made. I think it is not competent for that purpose; there is no basis for the selection of 25,000, utterly arbitrary; there is no basis for the selection as to first runs, (251)

second runs, third runs and fourth runs. It is purely arbitrary. It is a purely arbitrary demand made upon us. We think that this material will not furnish any basis for any statistical study that will be trustworthy.

Judge Hand: Overruled.

Mr. Caskey: And I call attention to the fact that the picture that was selected was deliberately selected as the one which had had the greatest revenue-producing quality; so that on its very face it is an arbitrary selection.

(Government's Exhibit 41 for identification received in evidence.)

Mr. Wright: I will now offer—

Mr. Davis. What is the last tender?

Mr. Wright: 41.

Mr. Davis. That has been admitted?

Judge Hand: Yes.

Mr. Wright: Yes.

We will next offer 42 and 43, which are material of the same class as 41, separately bound.

Mr. Caskey: No. 43 is not.

Mr. Wright: That is correct. 42 we will offer. It is the same class of material as 41, separately bound.

Mr. Caskey: Same objection.
(252)

Judge Hand: Overruled.

(Government's Exhibit 42 for identification received in evidence.)

Mr. Wright: And I will offer 43—

Mr. Caskey: Just a minute, Mr. Wright. 41 and 42 are exactly the same thing subdivided into two volumes, is that correct?

Mr. Wright: I think so, right.

And we now offer 43, which is information furnished by Fox of a slightly different character. It is described in the exhibit. It deals with film rentals paid during the 1943-1944 season, and receipts from theatre admissions during approximately the same season.

Mr. Caskey: Well, the vice of this printed book—it has an alluring attractiveness but it is just plain wrong. The exhibit, as I recall it, is the film rental paid by National Theatres Corporation during the year 1944. My memory may be at fault. I think not.

Mr. Wright: The description may be inaccurate, but whatever it is it speaks for itself. It states film rental payments made by National Theatres Corporation in respect to

theatres in which it or its subsidiaries own a financial interest or in which it or its subsidiaries negotiated film licenses, including shorts and newsreels for 53 weeks beginning December 26, 1943, and ending December 30, 1944; and that (252a)

replies to interrogatory No. 12. And interrogatory No. 13 covers the same period; so it is true that that description in the list is incorrect in referring to the season. It should refer to approximately the fiscal year 1944, which is a few months difference on each end from the 1943-1944 season. (253)

Judge Hand: What are you talking about, Interrogatory No. 13 now?

Mr. Wright: 12 and 13, both. The period covered by the answer is actually from December '43 to December '44, instead of as suggested in the description, September 1, 1943 to September 1, 1944.

Mr. Davis: Did I hear correctly that that exhibit was of the National Theatres?

Mr. Wright: Yes, that is correct.

Mr. Davis: If so, then I wonder what is the reason for the substitution of the words "Theatres in circuits affiliated with Fox"? Why don't we use the theatres to which the exhibit refers?

Mr. Wright: I suppose that is a matter of artistic language. Actually I suppose National Theatres may be fairly described as a theatre circuit affiliated with Fox, since Fox owns 100 per cent of it. But obviously we are not offering the description. We are offering the exhibit.

Mr. Proskauer: As I understand it, this column headed "Description" is not going in evidence at all?

Mr. Wright: Of course not.

Mr. Proskauer: It is just a shorthand method of identifying an exhibit, which is the only thing before the Court?

Judge Hand: That is true.

(254)

Mr. Wright: Exactly.

Judge Hand: 43 is received.

(Government's Exhibit 43 for identification received in evidence.)

Mr. Wright: Then I shall offer No. 44, which are admissions of fact furnished by Fox in 1945 which relate to the distribution of the films first-run in the cities over 100,000.

Mr. Caskey: There again, Mr. Wright, the description—is this only for four seasons?

Mr. Wright: The seasons in question are 1936-1937; 1939-1940; 1940-1941; 1941-1942, and 1943-1944. This is a short-hand description there which is somewhat less accurate than what I just stated.

Mr. Caskey: Well, I can't read shorthand, but the description here would seem to embrace something more than what is being offered.

Mr. Wright: I think it is perfectly clear from the exhibit itself.

Judge Hand: It is received. Now what next?

(Government's Exhibit 44 for identification received in evidence.)

Mr. Wright: We will also offer 45, which is the portion of the 1939 answers of Fox which deal with the history of the development of the business.

(255)

Any objection?

Mr. Caskey: None.

(Government's Exhibit 45 for identification received in evidence.)

Mr. Proskauer: Your Honors, I do not want to be over-technical here, but Mr. Wright addressed a general question to this table, "Any objection?", and Mr. Caskey answered "No." I do not want to have any misunderstanding about it that I am reserving my objection, which is fundamental, and which the Court has taken under advisement, overruled,

and I am not repeating it with respect to each one, but I do not want to be put in a position as though I were waiving it.

Mr. Wright: No question about that.

29, I believe, which appears next on the list here has already been offered and received, the Movietone News answer.

Mr. Caskey: Now, Mr. Wright, when you introduced that I understood you only introduced that much which related to sound stages. We did not see the exhibit you handed up, so I don't know.

Mr. Wright: Well, let us take a look at it. 29 actually contains in it as a single document the answer of the Movietone News Interrogatories 25 through 38.

Mr. Caskey: How much is being offered?

Mr. Wright: We offer the entire exhibit.

(256)

Mr. Davis: This is another 29? Are you still on it?

Mr. Wright: That is Exhibit 29 for identification.

Judge Goddard: You have two exhibits for identification marked 29?

Mr. Wright: No, there is only one exhibit, your Honor; it appears twice on the list because it refers to different interrogatories. I think the reason it was listed twice there was because whoever was making up the list was trying to preserve a sequence of separating or putting the production answers after the history answers, and where he had an exhibit that contained both types of information, he broke the list here, although the single document which contained both types of information was not broken. It just consists of one exhibit.

Judge Hand: Now, Interrogatory 26 has already been offered. Interrogatories 27 and 8 have not been, as far as I can see.

Mr. Caskey: What he has handed me are answers to Interrogatories Nos. 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39.

Judge Bright: All by Movietone?

Mr. Caskey: All by Movietone and all in evidence quite unknown to me. They are not listed in this book.

Mr. Wright: Well, if there is any objection to any of the other parts of the answer going in, I suppose that can be (257)

removed. But, in any event, we are perfectly willing to offer the exhibit as it is containing those answers, and the list here should be corrected to show what it does contain. I think the reason those are not listed is that most of these answers are of a negative character, and that is why I think we listed them the way we did. That is, the answers to 30 through 39 are simply, say, none in each case, and that is why I think they were omitted from the list.

Judge Bright: How about the answer to 29, answer to Interrogatory No. 29?

Mr. Wright: The answer to Interrogatory No. 29?

Judge Bright: Yes.

Mr. Wright: As contained in Exhibit 29?

Judge Bright: Yes.

Mr. Wright: It simply says, "State the approximate number of persons now employed by defendants and its subsidiaries in the production of motion pictures within the United States." The answer is, "Approximately 150 persons are now employed by defendant in the production of motion pictures."

Judge Bright: Well, are you offering that?

Mr. Wright: We are not offering in evidence any more than the answers which are listed here, but they are of so little significance that it does not make any difference so far as we are concerned for the purposes of the record whether (258)

all of the answers go in or not. We simply did not want to mutilate the document as it came to us, because I assume that the defendants might be interested in having that other data in the record that is here. But as far as what we would rely on, we would rely only on the part of the answer that appears in the list here.

Judge Bright. What are you offering?

Mr. Wright: We are offering the exhibit as it now stands with the complete——

Judge Hand: What exhibit, 29?

Mr. Wright: Exhibit 29 which contains the answers of Movietone News to Interrogatories 25 through 39 inclusive.

Judge Bright: Then we will have to change the book to add 29 to 39 inclusive, page 14.

Mr. Wright: Yes, it should be changed to note that it does contain that additional data in it, although, as I say, it was omitted from the description because there is no particular significance in it.

Judge Hand: I do not understand what you are talking about. You are putting in 29, and what does it contain? It has already been put in, hasn't it?

Mr. Wright: 29 contains the answer filed by Movietone News, Inc.

Judge Hand: Just a minute. 26 has already gone in. I mean the answer to Interrogatory 26 has already gone in? (259)

Mr. Wright: That is right. But that is contained in this Exhibit 29 which also contains the answer of the same company Movietone News to interrogatories Nos. 25 and 39 inclusive.

Judge Hand: 25 and 39?

Mr. Wright: 25 through 39 inclusive.

Judge Hand: Mr. Caskey, is this all right as far as you are concerned?

Mr. Caskey: Yes. I was just surprised it was in evidence. We have no objection. Mr. Wright says the answers to the interrogatories show that the company has not engaged in the practices which we are charged with, and for that reason it should go in evidence.

(Government's Exhibit 29 for identification received in evidence.)

Mr. Wright: Before we leave 29 I think this supplementary answer of Movietone News furnished by Mr. Caskey

should be marked and is offered as 29-A. That contains supplementary answers by that company to interrogatories 28, 29 and 30 as of September 27, 1945.

(Marked Government's Exhibit 29-A.)

Mr. Wright: Then we will offer the corporate chart of National Theatres Corporation's holdings, which has been marked as Exhibit 21 for identification. Now, that is the answer to interrogatory 17 of the '39 interrogatories.

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Mr. Caskey: May I see that a minute, Mr. Wright?

Mr. Wright: Yes.

Mr. Caskey: This is the 1939 list. Now, you have been furnished with an up-to-date one.

Mr. Wright: We are offering with that No. 22 for identification which, I believe, is the list furnished with your letter of June 26, 1945, which states that is correct as of May 15, 1945.

(Government's Exhibits 21 and 22 for identification received in evidence.)

Mr. Wright: Then we are offering 23 and 24 for identification which are also National Theatre's answers showing the theatres in which it had formerly had an interest and in which the interest had been discontinued. 23 relates to the wholly-owned, and 24 to the pooled theatres.

Mr. Caskey: This is 1939 again?

Mr. Wright: That is correct.

(Government's Exhibits 23 and 24 for identification received in evidence.)

Mr. Wright: Now we will begin on the Loew answers to the 39 interrogatories.

Judge Hand: Just a moment, if you please.

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Mr. Wright: I will first offer Exhibit 46 for identification, which contains the answers of Loew to interrogatories 1 to

24 inclusive, largely being concerned with the organization of the company.

(Government's Exhibit 46 for identification received in evidence.)

Mr. Davis: There is genealogy in this, if the Court please, but we don't object to it.

Mr. Wright: The only reason we offer it is because it is in a very convenient form and would probably be offered by the others anyway.

Judge Hand: I think it will probably be like a great deal of this stuff, like most of the stuff, for instance, in the Aluminum case, covering whole walls of the courthouse, and nobody ever looked at it.

Mr. Wright: Of course we hope that fate won't befall most of this material. We have stripped down this case quite materially to what you see here; that is, we are not offering by any means all the documents that are available.

We will also offer No. 47, which is Loew's 1945 supplement to interrogatories 15, 17 and 18.

Mr. Davis: May I see that a moment? You offer these schedules with the covering letter, I take it?

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Mr. Wright: Yes.

Mr. Davis: 15, 17 and 18, is it?

Mr. Wright: 1945 supplement to 15, 17 and 18.

Mr. Davis: Yes.

(Marked Government's Exhibit 47 in evidence.)

Mr. Wright: Then we will offer No. 48, which contains interrogatory answers to Nos. 55, 56, 57, 58, 51 and 53.

Mr. Davis: Will you wait just a moment, Mr. Wright?

Mr. Wright: Surely.

Mr. Davis: They are all a part of the same answers to interrogatories? You are just offering separate answers?

Mr. Wright: They are all contained in one exhibit, which is marked No. 48 for identification.

Mr. Davis: I understand: You are offering the answers to Interrogatories 55, 56, 57 and 58 in that exhibit?

Mr. Wright: And 51 and 53.

Mr. Davis: 51 and 53.

(Marked Government's Exhibit 48 in evidence.)

Mr. Wright: We will withdraw Exhibit 49, which there again is monthly theatre reports, and will offer No. 50, which covers Loew production answers for 1939.

Mr. Davis: Is that in a separate answer to interrogatories, separate interrogatories, or is it contained in this—
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Mr. Wright: 50 contains the answers to 25 through 39 inclusive.

(Government's Exhibit 50 for identification received in evidence.)

Mr. Wright: Then we shall offer exhibits containing the Loew answers with respect to distribution, which were filed in 1939 and which are marked 51 through 55 inclusive. I believe all contain similar material. 51, I think, is somewhat—I will offer 51 first. That contains the answers to Interrogatories 40 through 46.

Mr. Caskey: We have the same objection that we urged with respect to the Fox answers, to similar questions, that they are not representative and typical.

Mr. Davis: We join in that motion.

Judge Hand: Overruled.

(Marked Government's Exhibit 51 in evidence.)

Mr. Davis: Just a minute, Mr. Wright, will you please. My attention has been called in connection with the tender of Exhibit 50, which, you said, contained answers 25 to 39 inclusive. I am reminded it does not contain all of them; the description is inaccurate.

Mr. Wright: My description may be inaccurate, my oral one, but I see that the list itself does not list a part of it; that the only interrogatories which are in 50 are those which
(264)

are in the list here. I can check that in a moment. I think the mistake was mine but I will clear it up in a moment.

50 contains the answers to 25, 26, 27, 28, 29 and 30, which are not mentioned on our list—

Mr. Davis: You have offered them, nevertheless.

Mr. Wright: 31, 32 and 33 are also contained there. 34, 36 and 37.

In this case our offer is confined to the data, I think, which is listed on the list. If the defendants wish to have the other data that is contained there actually received in evidence, we have no objection. Again, the only reason these answers were listed was because those are the only ones in the exhibit upon which ~~we would~~ rely, but we have no objection to the—

Mr. Davis: I haven't any choice, Mr. Wright, as to what is offered and what is not offered, if I understand distinctly just what is offered. I don't want any dispute hereafter as to what is in and what is out of the record.

Mr. Wright: Yes.

Mr. Davis: And I am not suggesting to you that you include or omit.

Mr. Wright: I simply wanted to avoid, if I could, physically mutilating the interrogatory in the form in which we (265)

got it from you, because I assume that you might wish to have the other data contained in the answers that we do not specify in our printed list.

Judge Hand: Are you offering the answers to 29 and 30?

Mr. Wright: No, we are not. We are only offering the answers that are written on here.

Judge Hand: All right. So you are offering as 50, the answers to interrogatories 25, 26, 27, 28, 31, 35, 38 and 39?

Mr. Wright: Correct.

Mr. Davis: Very good.

Judge Hand: That is received.

Mr. Wright: 51, I believe, we covered. 52, 53, 54 and 55 are all answers to interrogatories 48, which happened to

be separately bound, and each one relates to a different city. We will offer those together.

(Marked Government's Exhibit 52 in evidence.)

Mr. Wright: We are offering 53, 54 and 55 also.

(Marked Government's Exhibit 53 in evidence.)

Mr. Davis: It is Mr. Caskey's objection, in which we join, that they are selected cities and have no bearing and relevance to the overall picture the Government asserts.

(Marked Government's Exhibits 54 and 55 in evidence.)

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Mr. Seymour: Mr. Davis has made an objection to this exhibit, and I want it perfectly clear that any objection made by any defendant will be deemed made by all and the ruling applicable to all, because I should object to this as well as many others.

Judge Hand: I think that will save time and preserve your rights. Of course it is my practice, and has always been, to admit everything in a suit of this sort unless, as they used to say in the elevated railroad cases, it was more than five blocks from the Bowery.

Mr. Wright: Then we will offer 56 for identification, which are Loew's 1945 answers to the 1945 interrogatories 1 through 13—which are, as stated on the list there, 1, 2, 3, 4, 5, and 12 and 13.

Mr. Davis: For the season of 1943-1944?

Mr. Wright: It all relates to 1943-1944.

(Marked Government's Exhibit 56 in evidence.)

Mr. Wright: Then we will offer this Exhibit 57, which are also all Loew's answers to the 1945 interrogatories, which have been subdivided into 38 subnumbers in accordance with the volumes in which, I believe, they were furnished to us and which are described here on pages 21, 22 and 23 inclusive.

Mr. Davis: Have you that document before you?

Mr. Wright: Here they are. Each one bears the number 57 and then a dash. Here is 57-1.
(267)

I want to correct the record, if I said 38. There are 49 of those volumes, 57-1 through 57-49. I think there is one for each State and the District of Columbia.

Judge Bright: That covers pages 21, 22 and 23 of your printed book?

Mr. Wright: Yes, sir.

Mr. Davis: If the Court please, there are schedules which apparently were prepared by my clients for our use and for delivery to the Government in answer to its request. They were delivered, I think, with the understanding that any errors which might be discovered on a rechecking could be corrected, and I should not want to be textually bound by them; but I should also say that anybody who wants to go through these particular exhibits and extract the juice from them has quite a few days' work ahead of him.

Judge Hand: Yes.

Mr. Wright: As far as any of these exhibits are concerned, at any time that an error appears, they can, of course, be corrected.

Judge Bright: Is there any juice in them?

Mr. Davis: I think most of them, your Honor, are thoroughly barren of juice but I do not want to commit myself
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even on that.

Mr. Wright: Next we will offer—

Mr. Davis: Where are we now?

Mr. Wright: No. 58.

Mr. Davis: Gone through that schedule on page 22, have we?

Mr. Wright: That is right.

Mr. Davis: That is the one the clerk is working on now?

Mr. Wright: That is correct.

Mr. Davis: Then what about 57-4?

Mr. Wright: That is already covered.

Mr. Davis: That is all in that encyclopedia that you have there?

Mr. Wright: That is quite right.

(Marked Government's Exhibits 57-1 to 57-49 inclusive in evidence.)

Mr. Wright: The next exhibit—

Judge Bright: It is 58, isn't it?

Mr. Wright: 58 we are now offering, the admission of facts furnished by Loew, covering the 1943-1944 season.

Mr. Davis: That is 58?

Mr. Wright: That is 58.

Mr. Caskey: Four seasons?

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Mr. Wright: That is correct.

Mr. Davis: How many of those are there? The clerk seems to have quite—is that all one?

Mr. Wright: That is all bound in.

Mr. Davis: I noticed the clerk running his fingers through it, counting them.

Mr. Wright: Of course, I do think there is no need to have the marking done here in the presence of the Court. I think maybe that could be handled outside.

Judge Bright: Your printed book covers more than four seasons, doesn't it?

Mr. Wright: The description there says seasons 1936-1937 through 1943. That is not strictly accurate. There are four seasons covered. The first one is 1936-1937, the next is 1939-1940, the next is 1941-1942, and the last is 1943-1944, and that applies to all the admissions of fact for 1945 wherever you see them in the list.

Mr. Davis: That is in this volume which you marked Exhibit 58?

Mr. Wright: Correct.

Mr. Davis: Maybe the Court might want to see that and see how illuminating it is.

(Marked Government's Exhibit 58 in evidence.)

Judge Hand: We now come to whatever Paramount may contribute to its destruction.

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Mr. Wright: The first item is No. 59, which details the facts about its organization.

Mr. Davis: What are we on, Paramount?

Mr. Wright: That is one that I do not think can destroy it.

(Marked Government's Exhibit 59 in evidence.)

Mr. Wright: 60 and 61 fill in, I think, the other organization interrogatories in the '39 answers as described on page 25, and 62—

Judge Bright: You are offering 60 and 61?

Mr. Wright: Yes, we are offering 59, 60, 61, 62 and 63, which cover the Paramount 1939 organization answers.

(Government's Exhibits 60 and 61 received in evidence.)

Judge Hand: I do not know that it is worth wasting time, but I would join Judge Bright in his inquiry as to what in the world we care about the current indebtedness of Paramount?

Mr. Wright: I don't—

Judge Hand: It is a hard question for you to answer, I know.

Mr. Wright: I would say the reason that is in there is because, again, we wanted simply to avoid any questions that might be raised by tearing apart these things in the form that they were given to us and it was data that we had asked
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for, and it is contained in here with other relevant data, and to us it seemed that we would be less open to criticism if we simply offered it as it had come to us.

Mr. Proskauer: On the contrary, we gave you what you asked for and did not admit it was relevant. I think it is wholly irrelevant.

Mr. Wright: There may be, of course, much of the material which is in here which may never be referred to in the course of argument or briefs.

Judge Hand: That is always so, unfortunately. It isn't true—

Mr. Proskauer: Your Honor means it is always so in one of these Government antitrust suits.

Judge Hand: It isn't true only of them, you will admit, in your large experience.

(Marked Government's Exhibits 62 and 63 in evidence.)

Mr. Wright: Then we will offer 64, which is Paramount's supplementary answer as to its subsidiary corporations as of 1945.

(Marked Government's Exhibit 64 in evidence.)

Mr. Wright: And 64 and 66, which are also answers to 1939 interrogatories, showing the discontinued theatre interests.

(Marked Government's Exhibits 65 and 66 in evidence.)

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Mr. Wright: Then we will withdraw the offer of 67, 68 and 69, the monthly theatre reports.

Mr. Davis: Where are we now, Mr. Wright. Pardon me.

Mr. Wright: We are on page 26 and we have just withdrawn offering Exhibits 67, 68 and 69 for identification.

Mr. Davis: I am glad I got there in time. Everything before that has been offered?

Judge Hand: Wouldn't like you to tempt them to offer it, you know.

Mr. Wright: Then we will offer the Paramount production answers of 1939 which are in these volumes marked for identification as 70 and 71 and 63.

Judge Bright: You are offering 63—

Mr. Wright: Yes.

Judge Bright: And 70 and 71?

Mr. Wright: Yes.

Mr. Seymour: If the Court please, I would like to raise a question about some of these three exhibits, because, while I realize your Honors will take the evidence probably, I wondered whether we could not get some little slicing down of the material. These three exhibits relate in whole or in part to production activities, and it was pointed out to your Honors in the opening that, whereas the complaint talks a
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good deal about a charge of conspiracy with respect to production, there wasn't anything about that in the trial brief. If the Government has abandoned that claim, why should we load the record with exhibits on that subject? If the Government still presses the claim, we need to know that. And may I through the Court ask your Honor to ask Mr. Wright to state whether or not that charge of conspiracy with respect to production is still in the case?

Mr. Wright: If the Court please, certainly the evidence of what was done with respect to interchange of talent, equipment and other phases of production material is in the case. We do not claim that that interchange of production facilities is evidence in itself, that these people have together monopolized production. We do think the evidence of interchange of stars, talent and equipment is relevant and significant as showing the essentially non-competitive nature of the relationship between them; that is, it does have evidentiary value on the issues in the suit.

The Court: We will admit it.

Mr. Seymour: There is just one other question that I would like also to raise on Exhibit 63 in this group of three. That contains Paramount answers as to the cost of producing short subjects and newsreels from 1930 to 1938. Now that
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material was obtained by the Government before the consent decree. The consent decree, in Section 4-B, a provision is still in effect, enjoins these defendants from forcing shorts or news reels. This material was relevant to the original

charge. It seems to me to be out of the case in the light of the continuing provision of the decree. And I raise that question only because if that sort of thing could be eliminated at this stage, it would lighten the load a little bit; but if the Government counsel still wants to press it, I simply call attention to the fact that it seems wholly irrelevant in view of that provision.

Mr. Wright: Its only relevance, if the Court please, is this: this material does not prove any forcing of shorts, news reels, in itself. It simply gives a picture of the extent to which that phase of the business figured in the overall Paramount business and how it compared with the feature film business, which is the main subject of the suit.

Judge Hand: It is very hard for the Court safely to rule out things, and safer to let them in, but I do think sometimes, and I think probably in this case, you ought to take a little more risk in your case than you seem inclined to. After all, things that are so remote that we would probably pay no attention to them, and you haven't it in your brief, why (275)

should they be in here? I really am putting it up to you. I would think they only cumbered the record.

Mr. Wright: If the Court please, as to that Exhibit 63, I do not think that some of this material is particularly vital to the case but it does contain material which we do think is relevant and rather than tear the answer apart, I would rather put it in this way, so that in case it is necessary to rely on it, it will be there. I do not think there is going to be any encumbrance in so far as the work that your Honors will have to perform is concerned.

Mr. Proskauer: Your Honor, not in the form of objection to evidence but following Mr. Seymour's question, I am wholly at sea as to whether the Government is pressing in this courtroom what some of the court and some of my colleagues understood they were withdrawing and that was a claim that there was a conspiracy in regard to production. Mr. Caskey was arguing yesterday and your Honor sug-

gested that was not the Government's claim, yet when the question is put to Mr. Wright here a few moments ago, we don't get an answer to the question which your Honor put to him, and it makes a very great difference in the time we are going to consume in our defense here. I should like to know if the Court thinks it is a reasonable request, whether (276)

Mr. Wright claims that by this evidence of exchange and any other evidence he has, there has been a conspiracy to monopolize production, as distinguished from exhibition? It would seem to me, your Honor, that if he could answer that question yes or no, we would know what we have got to do in presenting our defense. We do not know at this minute.

Mr. Wright: If the Court please, I can only state what I did before, that we do not argue or won't attempt to prove any conspiracy to monopolize production as such. However, it is perfectly clear that the monopolization of a market, the theatre market, in the distribution facilities, does have an effect on production and does give these people a control over production of films that they otherwise would not have. And we also, I repeat, offer the material as to the interchange of production facilities as merely some evidence of the essentially non-competitive relationships that prevailed between the major producer exhibitors.

The Court: We will receive it. You have gone through to 71, haven't you?

(Marked Government's Exhibits 70 and 71 in evidence.)

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Mr. Wright: Then we will offer in evidence the distribution answers of Paramount filed in 1939, which are contained in volumes marked for identification as Exhibits 72 through 79.

Mr. Caskey: We have the same objection to these as to 41.

Judge Hand: Are you making an objection?

Mr. Caskey: Yes, we think this is the same type of material for Paramount as 41 does for Fox, and we have that special objection.

Judge Hand: Overruled. You are offering 71, 73—

Mr. Wright: 74.

Judge Hand: (Continuing) 75, 76, 77, 78 and 79?

Mr. Wright: Correct.

Mr. Seymour: Of course, here is a whole group of exhibits, 73, 74, 75, 76, 77, which deal with the matter that I just mentioned before, shorts and newsreels. It seems to me to be taken care of by the decree, and why it should be dumped into the case at this time, when none of it can show any possible violation of the decree, I cannot imagine.

Judge Goddard: Mr. Wright, the question I was going to ask you before Mr. Proskauer spoke was, Do you claim Section 4-B of the consent decree has been violated?

Mr. Wright: No. This material as to shorts and newsreels is not offered to show evidence of forcing of those newsreels. It is offered to show the relationship between (278)

the defendants in handling feature films also carries over into shorts and newsreels. It is a relatively unimportant part of the business but still a part of the business which is the subject matter of the lawsuit, that is, the interchange of license fees among these different groups does extend to shorts and newsreels as well as to feature pictures, and we are simply showing here what the general facts are with respect to that phase of the business. It is not an important one, admittedly, but it does have relevance.

Judge Hand: Well, you know, it is a troublesome thing, this attempt to put everything in as background, which is constantly done. Of course, when we are engaged in a jury trial we have to sit up and take notice and rule it out or rule it in and not just slop along, and I am afraid we are slopping along a good deal here; but if you insist that it is relevant and important, we are going to let it in. I think that is, really, on the whole, mainly your responsibility, as

to whether you want to put in a lot of things here which you admit haven't any very direct bearing and probably will not be alluded to or considered. That is what you have almost said to me.

Mr. Wright: That is virtually what the fact is. I cannot tell at this time how much importance ultimately might be attached to some of those figures on shorts and newsreels. (279)

As of now, I think it would be very little, but in making my record, it seems to me that I am entitled to that much protection, provided we can do it without unduly burdening the Court. Where this material is contained in these answers with this relevant material, I do not see any advantage, really, for the Court or anyone else in separating it out physically, as long as we have separated it out here descriptively, so it can be conveniently disregarded.

Judge Hand: There is this advantage, that if you put this thing in, you are certainly tempting strongly the defendants to put in a lot of evidence to answer it. It either has no purpose, or, if the inferences which you intended to give rise to are incorrect, it will be answered by testimony. That is the very sort of thing that makes these cases so horrible.

Mr. Wright: If the Court, please, we have made—

Judge Hand: I do not see why you should put in evidence here which you can hardly see any relevancy to and say, practically, to the judges, "Well, you should worry."

Mr. Wright: We have made, I think, a very sincere and a quite unusual effort, if the Court please, in organizing this material in this form, to make the handling of a record like this as expeditious and as convenient as possible.

Judge Hand: That is very good, and we appreciate it very much, but why should you put in stuff you cannot see (280) the relevancy of?

Mr. Wright: Well, I say that I think it is relevant to show the full relationship among the defendants of the busi-

ness they do with each other, whether it is done in the form of newsreels and shorts as well as features. In terms of dollars and cents it is a relatively unimportant part of the business but it is a part of it, and if we arbitrarily excluded it, I would always be subject to the charge, I suppose, that I had only given the Court a part of this picture of the relationships between the defendants without giving all of it. It just seems to me it is something that shapes itself down in the end without great inconvenience to anyone providing that the material is so segregated so that it can be dealt with effectively in the briefs.

Judge Bright: Isn't it your main contention that the violation of the Sherman Act is in the licensing, distribution and exhibition of features?

Mr. Wright: That is quite correct, your Honor. That is the backbone of the business.

Judge Bright: These are not features.

Mr. Wright: These are simply these one-reel fill-ins.

Judge Goddard: Shorts.

Mr. Wright: Or newsreels, which are used to supplement a feature program in theatres.

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Judge Bright: There is no subsequent run of these, is there?

Mr. Wright: They do have runs, but they aren't of the same significance as feature runs. There is no question about that.

Judge Hand: What are these things you are objecting to?

Mr. Seymour: Well, I was raising the question, not as an objection.

Judge Hand: The numbers of the exhibits?

Mr. Seymour: I called your Honor's attention to the fact that Exhibits 73, 74, 75, 76 and 77 related to newsreels and shorts, and they also happen to relate to one season, 1936-1937, before the date of the decree, and then some of them run afoul of the other objection made here, that they were selected by cities and they just are samples of the kind of irrelevancy as to which one can almost put one's fingers on

the fact that they haven't a thing to do with the case at any stage.

Mr. Goddard: I would let him save it for rebuttal, if he needs it.

Judge Hand: We will exclude 73, 74, 75, 76 and 77. As Judge Goddard says, if you can do anything with those in rebuttal, we may consider them.

It also goes back to some other exhibits. What are they? (282)

To the shorts you mentioned before.

Mr. Seymour: I raised the question first, I think, on Exhibit 63.

Judge Bright: Wasn't Exhibit 40 part of it, too?

Mr. Caskey: 30 is the first one involved, page 7: Answers to interrogatories 41, 42, 43, 44, 45 and 46. I move to strike it out.

Judge Hand: Motion granted.

Mr. Seymour: And the same objection applies to Exhibit 63 with respect to interrogatories 27 and 28, which are in that exhibit—the second Exhibit 63, appearing on page.

Mr. Davis: If the Court please, for fear that I might be losing something, I should like to move to strike out Exhibit 51, produced by the plaintiff, Nos. 41, 42 four—

Mr. Wright: Wait just a minute. 51—

Judge Bright: Yes, 51 has features in it in answer to interrogatory 40.

Mr. Davis: Yes, and I am moving to strike out the answers from that exhibit, the answers to interrogatories 41, 42, 44, 45, 46, relating to shorts and newsreels.

Judge Hand: You also include 43?

Mr. Wright: You want to include 43 and 44.

Mr. Davis: Didn't I name 43 and 44?

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Judge Hand: No, you skipped them.

Mr. Davis: There is almost as much trouble to picking these out as to let them ride, but I am not going to have it

charged that I have fewer objections on this record than anybody else. I amend my motion to read the answers to interrogatories 41, 42, 43, 44, 45 and 46; and Exhibit 56, the answers to interrogatories No. 4, No. 5—I think that's enough.

Judge Hand: Granted.

Mr. Seymour: One of my brethren on the other side says that as to 63, interrogatories 27 and 28, it is not clear that that was within your Honor's ruling, but it raises the same question. It is the second 63 on page 27, interrogatories 27 and 28.

Mr. Wright: Those are stricken out.

Judge Hand: You want to strike out the answers to 27 and 28, do you?

Mr. Seymour: 27 and 28. They fall in the same category.

Judge Hand: All right, granted. Now we come to 78.

Mr. Wright: No; I think the offer under consideration, if the Court please, is Exhibit 72, the answer to interrogatory 40, which deals with features. 41 and 73 were stricken. I don't think 72 has been ruled on yet, has it?

Judge Hand: 72 does relate to features.

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Mr. Wright: Yes.

Judge Hand: That is extant.

Mr. Wright: Then 73 through 77 were excluded, and the next offer is—

Judge Hand: 73 to 77 are excluded.

Mr. Wright: The next offer is 78 to 79, which relate to features.

Mr. Seymour: They are subject to the selectivity objection which has been made before in connection with an earlier exhibit, and I assume that in addition to preserving the objection as to each defendant, where one makes it, that if an objection is once made to a type of exhibit, it may be deemed to continue to the same type later on, so we do not have to repeat them. This objection as to 78 and 79 has already been made to earlier exhibits but not as to these.

Judge Hand: That is overruled.

(Government's Exhibits 78 and 79 for identification received in evidence.)

Mr. Wright: Then we will offer Paramount '45 distribution answers, which are contained in Exhibits 80 through 83.

Mr. Seymour: The answers to interrogatories 4 and 5 in Exhibit 80 fall under the ruling just made as to newsreels and shorts, and they should be excluded.

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Judge Hand: That is right, they are, and 80 is otherwise admitted.

(Government's Exhibit 80 for identification received in evidence.)

Judge Hand: 81 is admitted.

(Government's Exhibit 81 for identification received in evidence.)

Mr. Wright: And then 82, your Honor.

(Government's Exhibit 82 for identification received in evidence.)

Judge Hand: 83 will be admitted.

(Government's Exhibit 83 for identification received in evidence.)

Judge Hand: 84, too.

(Government's Exhibit 84 for identification received in evidence.)

Mr. Wright: And I will offer 85, which finishes up Paramount.

Judge Hand: That is a sad looking sort of exhibit, 85. In what year does that begin?

Mr. Wright: That is an answer to the interrogatories that were served in 1939.

The Court: Well, I know, it might be in answer to anything. What has it got to do with the case, other than a terrific amount of genealogy?

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Mr. Wright: It simply is a history prepared by the defendants of the corporate continuity there, that is, shows how Famous Players-Lasky then became Paramount Publix, and that became Paramount Pictures, and it shows the acquisition of other producing companies and distributing companies going back, I think, as far as 1917. It is simply a summary statement of the growth of these companies and these circuits.

Judge Hand: We will let it go in.

Mr. Wright: I assume it is the sort of thing that the defendants themselves wanted to get in eventually anyway.

Judge Hand: Very well.

(Government's Exhibit 85 for identification received in evidence.)

Mr. Proskauer: It is genealogy.

Mr. Seymour: If your Honor please, I wonder if I could address the Court for a moment on a question that Judge Proskauer mentioned earlier today? We have gotten through 85 exhibits in pretty good time, and I would like to raise with the Court the question of whether we might arrange to have a recess in this case after the Government has completed its case, to enable the defendants to sift and prepare their case in the light of the case as it has gone in.

Judge Hand: I do not see why you should, as far as I am concerned, at all. The case has been in course of preparation,

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in a sense, for years and you had an absolute notice of what the Government was going to do. You knew all about this thing weeks ago.

Mr. Seymour: Let me say this, if your Honor please. This is of importance to us, and I would like to lay our problem before you. It was only when we got the Government's trial brief that we had any real indication as to the scope of the

case as it would be submitted to the court. True, we had had various versions of the case before, running all over the lot, including this charge of conspiracy to monopolize production, as to which I yet don't know what the Government's position is. Throughout the summer, throughout the period since we appeared before your Honors in July, my colleagues have been largely engaged in preparing this vast amount of material which is being dumped in. Your Honors see that the material consists of answers made in 1939 and then a great series of answers made in 1945. And the fact is, and I am sure this applies to every company that throughout the summer and right up until this very moment, most of the time of defendants' counsel and their associates and their assistants has been taken up in that way, and I think Government's counsel are entirely aware of that situation.

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Now, the fact is that it was not until September 20 when we got the Government's brief that the precise nature of the case that we would have to meet became clear. From the opening yesterday of Government's counsel it was not made more lucid for us, and in view of that situation it has been impossible to do the kind of sifting and winnowing of the oral testimony that we would ordinarily have done by this stage of the case.

Now, last week we met with Government counsel and discussed the trial procedure, and at that time it was my understanding that Government counsel indicated that subject to the Court's approval he would have no objection to a reasonable recess at the close of the Government's case to enable us to get our material in shape for expeditious presentation to the Court.

Now, the reason I raise this question is because just as I was required to open first, at great length, and a great burden to the Court, I shall be required also to go forward first with my oral testimony. My witnesses are scattered all over the country, as your Honors can see by the location of the various aspects of the business. Some of the officers of the company who would have to be called are now in Hollywood; and

what I should like to ask—and I think Government counsel will not object, and I hope it won't burden the Court—would be a reasonable recess when we get to the end of the (289)

Government's case; and at this rate I anticipate the exhibits will all be in within the next couple of days. You see, we are not standing in the way. Indeed, we are doing everything we can toward lightening that load.

Judge Hand: You knew pretty well what you had to meet, and you knew it was going to be documentary, and I think you have had all Summer to do it as well as years before. We cannot give our lives to this kind of a case, and if my life is as long, in spite of my age, as I hope it may be, I have no intention.

Mr. Seymour: If your Honor please, we have no desire to burden you in this respect, and I would not suggest and I do not suggest a long recess; but I suggest—

Judge Hand: What do you mean by "long"?

Mr. Seymour: Well, I would like myself to have, say, three weeks at the conclusion of the Government's case.

Judge Hand: It throws off the schedule of all the Judges here. That is not your fault. The Government got an expediting certificate which made it mandatory for the Court to furnish three judges. Now, how it expedites anything to tie up three judges in this kind of a case I leave to philosophers, casuists, metaphysicians and astronomers. But they are within their rights; and that has been done. Now, we are just not going to break up all our judicial affairs here in (290)

the Second Circuit for this case.

Mr. Seymour: Well, we have no desire to do it.

Judge Hand: I knew you have no desire to; of course you are excellent fellows and fine lawyers, but you have a program which leads to that.

Mr. Seymour: Well, I would be hopeful, if your Honor pleases, that the time spent in such a recess would be usefully spent in organizing the material in the light of the Government's case as it actually goes in, in the light of your

Honor's rulings on that evidence, which would enable us to put it in more expeditiously than if we have to get rushed into it without adequate time to visualize it; and I think that situation applies to every defendant in this case, and I think the Government understands it.

Mr. Proskauer: Would your Honors permit me to suggest how this matter first came up? In conference with Mr. Berge and Mr. Wright last week when we explained that the elevator strike was the climax of our difficulties in getting ready here, it was suggested by Mr. Berge that the Government would like to facilitate us by stipulating some of our evidence. Now, I do not want to mislead the Court, and I do not know to what extent we will be successful in the endeavor to stipulate evidence. But, personally, I am urging that that be done. I have some sales resistance on the part (291)

of some of my clients, and I want to be frank with the Court. But we then had a kind of lawyers' understanding,—not a stipulation—that subject to your Honors' approval we were going to try to shorten this case in the ultimate by taking some such adjournment as Mr. Seymour has suggested to your Honors after the Government's case was in, and that instead of applying for an adjournment at the outset. So we are not coming in here with a situation where we are just asking for delay. We are not. I really believe that keeping in mind your Honor's perfectly sound suggestion that the Court cannot give its life to this case, that we shall be saving some years of your Honor's valuable life if you will give us a short adjournment after the Government's case is in. I am satisfied from our talks with Mr. Berge and Mr. Wright that there is a reasonable possibility—which I can't give the Court as an assurance—that we may shorten some of the oral evidence in this case; and I am sure Mr. Wright will correct me if I have in any way deviated from a very meticulous account of what happened in our conference.

Mr. Wright: If the Court please, we have told counsel at that conference, and will repeat today that we would agree to any plan of procedure which would shorten the disposition of the case and get a speedy determination of this issue.

Now, at that time we told them that as far as calling (292)

witnesses is concerned, particularly when we are talking about their executives, there is no need as far as we are concerned to call any of them here to the witness stand; that if they will put what they want to say in affidavit form we would stipulate that they would testify in accordance with that affidavit, because we know pretty well what they can testify to. They have testified in a number of other cases; they know how far they can go, and we do not need any cross-examination in order to control that sort of testimony. We can, if necessary, of course, in rebuttal, in so far as the defendants' executives are concerned, call them under Rule 43(b) if necessary. But I merely point this out to say that while we have no objection to any continuance which will expedite the presentation of their defense, we do feel that as a condition to the granting of such a continuance there ought to be some kind of definite commitment as to the expedited procedure that is going to follow the continuance. That is, there should be some assurance that the interval will without question be used to streamline the presentation of their defense, and that we just do not have an interval where they come in at the end of the period and they start offering witnesses.

Mr. Seymour: I do not see how such a condition can be well agreed to at this stage. It seems to me, as I have said (293)

to the Court, what we want the time for is to get our defense organized so that we can put it in most expeditiously, and we hope that will save a lot of time. To what extent we can work out any dispensing with oral testimony is a matter that would have to be explored during that period. Your Honors will immediately recognize that substantial oral testimony will have to be offered anyway, probably, and it is just a matter of the extent.

Judge Hand: You go on with your offers in the case.

Mr. Wright: The next series of interrogatory answers are those of RKO. The first is numbered 86 for identifica-

tion and covers their answers to interrogatories 1 to '24, dealing with the organization of the companies, the intercorporate relationships; and we will offer with that 87, which is the 1945 supplement to that data.

(Government's Exhibits 86 and 87 for identification received in evidence.)

Mr. Wright: Then we will offer their tabulations of theatre interests which are found in 88 and 92.

(Government's Exhibits 88 and 92 for identification received in evidence.)

< Mr. Wright: We will withdraw the offer of the theatre reports marked for identification as 89 and 90. Those are both withdrawn. 86 is already in evidence.

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Judge Hand: What have you done with 86?

Mr. Wright: That is already offered and in under a prior description there. This is really just a note.

No. 91 we will offer, the answer of RKO, the holding company. It is simply necessary to make intelligible the answers of the other defendants referred to there.

(Government's Exhibit 91 for identification received in evidence.)

Mr. Wright: Then we shall offer the 1945 answer of RKO which takes care of interrogatories 1 through 5 inclusive of the 1945 data. That is contained in No. 93 for identification.

Mr. Leisure: Just a moment. With respect to 93, if the Court please, 4 and 5 in that exhibit have to do with shorts and newsreels. We presume the Court will rule the same.

Judge Hand: Yes. We will exclude 4 and 5.

(Government's Exhibit 93 for identification received in evidence.)

Mr. Wright: We will also offer 94 which contains RKO 1945 distribution data furnished in response to the 1945 interrogatories 6, 7, 8, 9, 10 and 11.

(Government's Exhibit 94 for identification received in evidence.)

Mr. Wright: 93 I think is already offered.

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And 95 is the RKO admission of facts.

(Government's Exhibit 95 for identification received in evidence.)

Mr. Wright: And we offer the history data contained in 91. That exhibit with reference to the distribution data also contained in the same exhibit was previously offered there at page 37. We offer the data described on pages 40 and 41 which are also contained in Exhibit 91; that is, the answers to interrogatories Nos. 45, 56, 57 and 58.

Then 96 is the answer of Keith-Albee-Orpheum Corporation, an RKO subsidiary, which covers interrogatories 1 through 24.

(Government's Exhibit 96 for identification received in evidence.)

Mr. Wright: Then we offer 97 relating to KAO discontinued theatre interests.

(Government's Exhibit 97 for identification received in evidence.)

Mr. Wright: And 98, the answers of KAO to 55, 56, 57 and 58.

(Government's Exhibit 98 for identification received in evidence.)

Mr. Wright: And we will also offer 99, which covers the RKO-Midwest answers to interrogatories 1 through 24.

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(Government's Exhibit 99 for identification received in evidence.)

Mr. Wright: And 100 which covers its discontinued theatre interests.

(Government's Exhibit 100 for identification received in evidence.)

Mr. Wright: Then we will also offer the production answers which are listed on page 47 there as contained in Exhibit 99—that is, the answers to 25 to 28 inclusive, interrogatories 31, 35, 38 and 39.

Then we will offer 101 which is the historical data furnished by RKO-Midwest in response to 55, 56, 57 and 58, and contains negative answers on distribution.

(Government's Exhibit 101 for identification received in evidence.)

Mr. Wright: Then we offer 102, which is another RKO subsidiary, Pathe News, Inc.'s answers to interrogatories 1 through 24—

Mr. Leisure: If the Court please, again that has to do with news pictures, and I assume the Court's ruling would be the same. We object to it.

Judge Hand: Where does that appear?

Mr. Leisure: Exhibit 102.

Judge Hand: Yes, I know. But the fact that it does not relate to features

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Mr. Leisure: It is listed as a Pathe News pictures, and they are listed here on page 48, Exhibit 102.

Judge Hand: Is that right, Mr. Wright?

Mr. Wright: I think counsel's statement is correct that Pathe News was primarily a distributor of newsreels. I am not sure, but it is just my recollection at the moment that they did not engage in other production-distribution activities.

Mr. Leisure: You mean a producer, Mr. Wright, I take it. It is a producer of newsreels, there is no question about that.

Mr. Wright: Exclusively?

Mr. Leisure: Shorts. They are not feature pictures, the same as these other shorts you were talking about.

Judge Goddard: In the same class as a short.

Judge Hand: Exclude 102.

Now 103.

Mr. Wright: That can also be withdrawn. That refers to Pathe News.

Mr. Leisure: 103, if the Court please, also applies to Pathe News, and 104.

Mr. Wright: I assume the same ruling will apply to 103 and 104 as applied to 102.

Then we will offer 105, the RKO-Proctor answers to interrogatories 1 through 24.

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(Government's Exhibit 105 for identification received in evidence.)

Judge Hand: It has come to adjournment time now, and we shall adjourn to tomorrow morning at 10.30.

(Adjourned to October 10, 1945, at 10.30 A.M.)

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New York, October 10, 1945;
10.30 o'clock a.m.

Trial resumed.

Judge Hand: We have decided that the public interests are sufficiently represented by the Government of the United States and that there is no reason for the intervention of the American Civil Liberties Union. Therefore, their motion to intervene is denied.

You may proceed.

Mr. Wright: If the Court please, I think when we adjourned yesterday we had offered Exhibit 105 for identification, which is described at page 51 of the list there, and I don't think—apparently it was admitted, so that our next exhibit will be 106, which relates to RKO-Proctor.

Judge Hand: We had not marked the exhibit as admitted. We had admitted it, however.

Mr. Caskey: What was that?

The Clerk: Exhibit 105 is received in evidence.

Mr. Caskey: That is the part described on 51 and 52?

Mr. Wright: Correct.

Mr. Caskey: But not the part on 53?

Mr. Wright: The part on 53 is merely a reference to what
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105 shows.

(Government's Exhibit 105 for identification received in evidence.)

Mr. Wright: Then 106, I take it, is also admitted.

(Government's Exhibit 106 for identification received in evidence.)

Mr. Wright: And 107 is next offered, the RKO—

Judge Hand: Have you offered 106?

Mr. Wright: Yes, I understood that had been offered and received.

(Government's Exhibit 107 for identification received in evidence.)

Mr. Wright: Then we offer 108, the answer of RKO Radio Pictures, Inc.

(Government's Exhibit 108 for identification received in evidence.)

Mr. Wright: And 109.

Mr. Leisure: As to 109, if the Court please, interrogatories 41 and 42, having to do with shorts and news-reels, should come out.

Mr. Wright: I don't believe they are——

Judge Bright: 109 does not mention that.

Mr. Wright: That is correct.

Judge Hand: All it says here is that it is not engaged in exhibition.

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Mr. Wright: I think he is referring, your Honor, to the notation at the bottom of page 57, where the answers to 41 and 42 are also in 109, and those, I suppose, will be excluded under the previous ruling.

Judge Hand: Yes, excluded as to 41 and 42.

(Marked Government's Exhibit 109 in evidence.)

Mr. Wright: Then we offer 110, described on page 56.

(Government's Exhibit 110 for identification received in evidence.)

Mr. Wright: As to 111——

Mr. Leisure: Just a moment. 27 and 28 have to do with shorts in that exhibit.

Mr. Wright: Those, I take it, are excluded.

Judge Hand: Excluded, 27 and 28.

Mr. Wright: Then 111, there is a similar exclusion as to Nos. 43, 44, 45 and 46, I presume.

Judge Bright: You offer the balance?

Mr. Wright: Yes, we offer it, what is on here—

Judge Hand: You offered 40?

Mr. Wright: Yes.

(Government's Exhibit 111 for identification received in evidence.)

Mr. Wright: And we offer 112, which is the RKO answer to interrogatory 48.

(301) (Government's Exhibit 112 for identification received in evidence.)

Mr. Wright: And we also offer these four answers relating to historical data which appear in 109, already admitted, I believe.

As to 113, that deals with the activities of the Van Beuren Corporation, which I believe produced only short subjects, is that correct?

Mr. Leisure: That is correct.

Mr. Wright: And I suppose that under the Court's prior ruling that would be excluded.

Judge Hand: Excluded.. That is all of 113?

Mr. Wright: Yes.

And the same would apply to 114, 115, all the data described on page 61.

That brings us to Warner. We offer No. 116, which contains the answer of Warner to interrogatories 1, 2, 3, 4, 9, 10, 11, 12, 13; 15(a), (c)-(g); 16(a), (c)-(g); 17-(a), (c), (e) and (f); and Nos. 18, 19, 20, 21, 22 and 23. Those answers are described on page 62 and 63 and the top of 64.

Mr. Davis: Mr. Wright, will you tell me the difference between 116 and 118?

Judge Hand: Has the stenographer got it right?

(Record read.)

Judge Hand: So, everything in 116 is submitted?

Mr. Wright: Yes; those are all listed on those three
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pages.

(Government's Exhibit 116 for identification received in evidence.)

Mr. Wright: Then we are offering 117, which is really a supplement to the answer to interrogatory 2 which was separately bound and so was given an additional exhibit number.

(Government's Exhibit 117 for identification received in evidence.)

Mr. Wright: Then we will offer No. 118——

Mr. Caskey: The document that bears No. 117 contains a great many other things than the answer to interrogatory No. 2(a). Now, the procedure we are following is for the clerk to mark the face of the document, with the result that there is physically handed to the clerk and to the Court papers which apparently are not in evidence, without any indication as to what is in evidence and what is not in evidence; and I am sure there will be no mechanics whereby appropriate page reference in the stenographic minutes can be readily made available when cross-examining as to these physical documents. I submit the orderly procedure is that the only thing that should be handed up is what is offered and to be marked in evidence. As to mutilation of the document, there is nothing to that. Let the Court just have possession of the things that are offered in evidence.

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Mr. Wright: If the Court please, all that we are offering of this 117 is the answer to 2(a) which is contained in this

117 along with others. Now, I think as to the record of what is in evidence or not, you have that in the record which we are making on the list as we go along, and I do not think that there is any difficulty there at all.

Judge Hand: I should think that was all right. It may take a nationwide survey to find out what is in the physical exhibits, but I think we can probably take care of it.

Judge Goddard: Looking over it how can you tell what is in evidence and what is not?

Judge Hand: It is so stated, as I understand it, that only the part that is in answer to interrogatory No. 2(a) is in evidence; isn't that so?

Mr. Wright: That is correct, your Honor.

Judge Hand: Haven't you stated that in your offer?

Mr. Wright: I stated that in the offer, and the list will have a record which shows that that is the only part that is admitted.

Mr. Caskey: The difficulty is that the Court may pick up Exhibit 117 with this gray guide book, which we have already demonstrated is full of errors, in order to ascertain what is in the record.

Now, it seems to me the mechanical work of keeping (304)

the record correct should be done by the counsel who has the burden of submitting the documents. This is not any surprise. It is not something that the Court has excluded on it. He is offering a document to which there are physically annexed many sheets of paper, and he only intends to offer some. I do not think we are adequately protected.

Judge Hand: I do not think you need fear our over-reading these exhibits.

Judge Goddard: The list shows what was offered.

Mr. Wright: Yes.

We are now on 118, I believe. 117, I believe, was admitted as to the answer to interrogatory No. 2(a). 118 is the answer of Warner which contains its answers to 5, 6, 7, 8 and 14, all of which are being offered, with the answer to 15(b), 16(b), 17(b) and (d), which are also contained

in the exhibit and being offered, and which are described on pages 62 and 63; and also the answer to 51 and 53 are contained in the document marked 118, and the offer includes all of those answers.

Mr. Davis: Before that is admitted, if the Court please, may I ask counsel for the Government to what issue in this case is the fixed indebtedness of Warner relevant? 118-5 is the fixed indebtedness of Warner; No. 6 is the current indebtedness of Warner; and I have some curiosity to know what relevancy those data have to the Government's complaint. (305)

Judge Hand: I think your question probably is impossible to answer by the Government.

Mr. Wright: If the Court please, I am inclined to agree with you. The reason there is because at the time those interrogatories were originally framed they were designed to disclose whatever cross relationship might appear as the result of indebtedness, one to another, or the holding of bond issues as well as stock obligations. Now, the net effect is purely negative, and it is not of great concern whether they go in or not; but we felt that they were a part of this data that they had supplied, and therefore should go in.

Judge Hand: I think you had better leave that out then. The difficulty that we find with your whole position here is that you have practically come in and said that what you objected to was this monopoly in exhibition of pictures. And yet you are fussing around and fussing around with all kinds of things that are so remote that they are apt to encumber the record a great deal on both sides, and neither you nor anybody could definitely point out what bearing they have. You just make general statements that you are entitled to the whole picture, and it is the same kind of talk about background and vague stuff that comes into every long case. I am not criticizing you personally. I think you (306)

have done a great deal to abbreviate your part in this pres-

entation of evidence, but I do not see why you are putting a lot of this stuff in. It has not been made clear to the three of us; we do not understand it.

Mr. Wright: Well, I think at any point where we do come upon evidence of that character, then, if your Honors feel that way about it, that it should be excluded. Let us cut it down right now and eliminate those parts.

Judge Hand: Why not exclude those?

Mr. Wright: I assumed it was simply a picture that I thought the defendants would want to get in anyway, and I thought it would expedite things if we put it in along with the other data which we rely on which are contained in the same documents, that is all.

Judge Hand: If the defendants want to put this stuff in you might as well put it in. I do not care anything about the order of proof.

Mr. Davis: If we want to put it in we will do it when we put in our case. I haven't the faintest idea that we will put in any of this.

Now, I suggest if these inquiries are directed to disclose whatever cross interests there might be or cross ownership in these companies, if they disclose anything of that sort the Government doubtless is entitled to put it in for whatever it may be worth. But what in the world is the use of (307)

putting in sheet after sheet after sheet which does not disclose anything of the sort?

Judge Hand: I do not understand that they claim, except by your alleged co-action that there is any such interest.

Mr. Wright: I am perfectly agreeable, your Honors, and I am going to point out the items under 118 that are listed there as the answers to 5 and to 6, which takes care of the current indebtedness item, and I am perfectly agreeable to doing that with reference to the similar answers to 5 and 6 in the other material that was offered.

Mr. Davis: Let me ask the next question—

Judge Hand: Just a minute. What are you consenting to have stricken out?

Mr. Wright: Wherever answers to interrogatories 5 and 6 of the 39 interrogatories—that is, where Nos. 5 and 6 appear, I assume they will be stricken.

Mr. Caskey: Mr. Wright, will you concede that as to Twentieth Century-Fox Film Corporation and National Theatres Corporation that no fixed indebtedness of either company is held by any defendant in this case?

Mr. Wright: That is certainly my impression.

Mr. Caskey: Well, do you concede it?

Mr. Wright: I would want to look at the particular record. I do not know offhand. I assume that it is the fact. (308)

But, in any event, in so far as these answers are concerned in the 39 interrogatories, 5 and 6, may go out wherever they appear here.

Mr. Caskey: Would you have—

Judge Hand: Just a minute. Let us not have all kinds of interruption here about other things. I want to know about 118. Is it all to go out?

Mr. Wright: No.

Judge Hand: Only 5 and 6?

Mr. Wright: 5 and 6. Those were the points raised as to fixed and current indebtedness.

Mr. Davis: Before we stop at that point, No. 7 calls for the 20 largest stockholders of Warner. I should like to ask the Government whether they contend that any of those 20 largest stockholders of Warner are also in the list of stockholders of the other defendants.

Mr. Proskauer: What is the point of it?

Mr. Davis: Just a minute.

Mr. Wright: I do not think we make any such contention. I think that is largely evidence which would have significance in dealing with the problem of relief. I think it would be a fact that the Court would wish to be aware of in determining what specific kind of dissolution relief

there should be in the case. On the issue of liability I do not think it is important.

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Judge Hand: I think that is too vague now. 7 and 8 are excluded.

Mr. Davis: Now may I ask as to 116-9, securities of other defendants held by Warner. Does the Government contend that there are any securities of other defendants held by Warner?

Mr. Wright: As I recall, those answers are negative, and again—

Mr. Davis: If they are negative what is their pertinence here?

Mr. Wright: I would assume that those were facts which they would be interested in showing. If they have no interest in having them in I would say again we can exclude those.

Judge Hand: All right, excluded by consent. What next? 9, 10, 11 and 12; is that true, Mr. Wright?

Mr. Wright: 9, 10, 11 and 12. That I think may also apply to the answers to those same interrogatories by all defendants.

Judge Bright: By all of the defendants? You say that may go out as to all of the defendants in the exhibits previously offered?

Mr. Wright: Yes. They have been offered and received here answers of the other defendants to those same interrogatories which are similarly negative in effect, and in so

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far as we are concerned they may be stricken.

Judge Hand: I am sorry to spend time doing it, but I think the way to make your record now is to make it right, to have excluded by consent, go right through and find out what they are, and we will mark them.

Mr. Wright: All right. I think they first appear on page 5; if you will simply run a line from 5 through 12, I think that will take care of the situation.

Mr. Davis: If the Court please, isn't there a shorter cut here which candor would dictate? Instead of sifting through this haystack, will not the Government concede of record that in these interrogatories there is no showing whatever of joint or partial ownership by one of these defendants, or the officers of these defendants in any other?

Judge Bright: Or any common director or officer.

Mr. Davis: Nor a common director nor a common officer. Now, a concession of that sort would take a lot of this straw off.

Mr. Wright: Surely. That is true as to the various defendant groups. In some cases there are two or more defendant corporations in the same group, such as Fox and National Theatres, both are defendants, and, of course, there are interlocking officials and stock ownership there; but as between the eight groups of defendants, I think it is quite true (311)

that there are no common officers; there is no common stock control, although it may be, of course, that executives or officials of one or more of them hold some listed stock in the others.

Judge Bright: Well, do your exhibits show that?

Mr. Wright: Our exhibits do show, I think, the facts that I have just stated, yes.

Mr. Proskauer: I can't hear you, Mr. Wright.

Mr. Wright: The answer is yes.

Mr. Proskauer: Do the exhibits show any kind of common stock ownership?

Judge Bright: Why not take one at a time? Are there any common officers in the eight groups of defendants?

Mr. Wright: No, not that I know of.

Judge Bright: Are there any common directors in the eight groups of defendants?

Mr. Wright: There are not.

Judge Bright: Are there any bondholders—

Mr. Wright: I think not.

Judge Bright: —common to the eight groups of defendants?

Mr. Wright: No.

Judge Bright: Now, how about the stockholdings of any character?

Mr. Wright: As to the stockholdings I assume, while (312)

I am not prepared to state that officials of the various companies may own listed stocks, and probably do, in those of some of the others, I do not think there is any contention that in any event any of them hold a sufficient stock interest to exercise control through that stock interest over the other group.

Judge Hand: Now, you are making a statement, as I understand it, that you do not know anything about it. You think it is possible that it exists. That is the last qualification.

Mr. Wright: I think it quite obviously does, yes.

Judge Hand: Quite obviously does?

Judge Bright: Do your exhibits show it?

•Mr. Wright: The reason for my statement is that we have asked the various companies in getting up-to-date data as to executives' theatre holdings, and they have furnished us with letters giving the extent of those theatre holdings. Now, in each case there has been excluded such holdings as they had in listed stocks of corporations which operate theatres. I assume the reason for that exclusion is that there are such holdings. We do not attach any significance to them.

Mr. Proskauer: May we not have it stated, then, with your Honors' permission, that there is no contention on the part of the Government that there is any common stock (313)

ownership between these eight groups that has any significance in this case?

Mr. Wright: Well, there is ownership of stock in corporations in which two or more of these groups have a common interest; there is no question about that. Counsel's suggestion goes much farther than the facts.

Judge Bright: You mean in theatres?

Mr. Wright: Theatre-operating corporations also. There are some corporations some of which are listed in our brief in which two or more defendants own stock interest.

Mr. Proskauer: With that exception what is the answer—let me put it to Mr. Wright—what is the answer to my question?

Judge Hand: Well, with that exception he concedes there is no common stock interest—

Mr. Wright: Interlocking stock interest, that is right.

Judge Hand: Interlocking stock interest.

Mr. Wright: That is right.

Mr. Davis: I assume, of course, that the statement that there is common stock interest will not float out in a void like that; that when he comes to those theatre-owning corporations in which there is some measure of joint interest, that will be definitely proven by the Government.

Mr. Wright: I think the best way to determine what (314)

the proof shows is to go ahead with the proof.

Judge Hand: All right.

Mr. Davis: That does not satisfy me, if the Court please. Go ahead with the proof to put in a haystack on the theory that somewhere somebody will find a needle in it? I would much rather have the needle produced.

Judge Hand: He will have to produce it as part of his case. Now go ahead. He has not pointed it out yet.

(Government's Exhibit 118 for identification received in evidence.)

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Mr. Wright: 118, as I understand the ruling is received with the answers to 5, 6, 7 and 8 excluded, and I think—

Judge Bright: I did not hear what you said, Mr. Wright.

Mr. Wright: As I understand it, 118 has been admitted for the answers that are described on pages 62, 63, 64 and 65 except that the answers to 5, 6, 7 and 8, appearing on page 62, have been excluded.

Judge Bright: I thought 9, 10, 11 and 12 were excluded.

Mr. Wright: And 9, 10, 11 and 12 are contained in one exhibit, exhibit 116. Those are also excluded.

Mr. Seymour: May it be assumed, if your Honors please, that similar interrogatories also admitted will fall under the ruling so that we won't have to worry about those now remaining in the record? There were interrogatories offered before and marked and I am trying to indicate to my clients which ones they were, but I thought, to save time, we would just have it understood they were excluded.

Mr. Wright: That is entirely agreeable.

As to 118—by the way, we are withdrawing the theatre reports listed on 65, numbered 121, 122 and 123.

Judge Hand: Those are withdrawn?

Mr. Wright: That is right, withdrawn.

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Judge Bright: Where is that?

Mr. Wright: Page 65, Nos. 121, 122 and 123. And I should like to call attention to a correction in the list there. For 118 you find interrogatories 51 and 53 listed. Also included there should be 50A and 51, which are the theatres disposed of.

Mr. Davis: What page are you on?

Mr. Wright: And 52. I am on page 65.

Judge Hand: 51 is there, isn't it?

Mr. Wright: I beg your pardon. 52. 50-A and 52 are the two that should be added there.

Judge Hand: How about these 1945 answers on page 64?

Mr. Wright: We are now offering 119, which contains the 1945 answers to—

Judge Bright: Mr. Wright, before you get to 119, at the bottom of page 65, there are two interrogatories under 118, one of which includes short subjects.

Mr. Wright: That I assume may go out under the prior ruling.

Judge Bright: Do you wish to have 25 go in? Do you wish to have the answer to interrogatory 25 go in?

Mr. Wright: That goes in.

Judge Bright: And the answers to 27 go out?

Mr. Wright: Correct.

It is also true that the answers to interrogatories 31, 35, (317)

38 and 39, that appear on page 66 as being contained in 118, are also offered, I believe, in evidence. Those relate to production.

(Government's Exhibit 119 for identification received in evidence.)

Judge Hand: I thought you said that you regarded that—perhaps I am mixing it up in this complex case—that the loaning of personnel is very small, proving nothing.

Mr. Wright: Well, no, if the Court please, I said I did think it had evidentiary value on the issue of the extent—

Mr. Proskauer: I don't hear that. I cannot hear a word.

Judge Hand: He said he did think that it had evidentiary value on the issue, I suppose, of cooperation?

Mr. Wright: Precisely.

Judge Hand: All right, let it go.

Mr. Wright: The next is—

Judge Hand: 119 on page 64.

Mr. Wright: That has been offered and, I think, received. It was marked by the clerk.

Mr. Davis: "Capital Invested." What is the significance of that 119 15(a), (c)-(g) "Capital invested."

Mr. Wright: I think the caption in the printed list "Capital Invested" is not quite specific enough. Actually what (318)

it does is to bring the answer to interrogatory 16, that was filed in 1939, down to date.

Judge Hand: What has this to do with anything? You have conceded that there was no common ownership.

Mr. Wright: If the Court please, I suppose it is still a part of our case to show what the corporate structure of these groups is and to show what, if any, changes have occurred since 1939, just so the Court has before it some

reasonably accurate picture of the corporation it is dealing with. That is all that this does, is bring that prior information in 15 and 16 and as to—

Judge Hand: All right, go ahead.

Mr. Wright: (Continuing)—corporate information down to date. It does show the—

Judge Hand: We will admit this one.

Judge Bright: 119 and 120, is that what that refers to, Mr. Wright?

Mr. Wright: That is correct, your Honor. Those—

Judge Hand: That covers everything, doesn't it, in this bracket under 1945 answers?

Mr. Wright: That is correct.

And I think the next thing that we can do are the 1939 distribution answers of Warner, which are contained in this Exhibit 124. That contains the material that is described there on pages 66 and 67, and I suppose the answers (319)

to 41, 42, 44 and 45 will be excluded in accordance with the Court's prior ruling.

Mr. Davis: Exhibit 144?

Mr. Wright: 124 is the number of the exhibit.

Mr. Davis: I didn't hear it.

Judge Bright: 43 is short subjects.

Mr. Wright: 43 also, I beg your pardon.

Judge Bright: How about 46?

Mr. Wright: That should go out also.

(Government's Exhibit 124 for identification received in evidence.)

Mr. Wright: We will offer 125, which are the Warner 1945 interrogatory answers, covering questions 1, 2, 3, 4 and 5.

Judge Bright: 4 and 5 are short subjects and newsreels.

Mr. Wright: 4 and 5 may be stricken.

(Government's Exhibit 125 for identification received in evidence.)

Mr. Wright: Then we will offer 126, the answer to interrogatory 6.

(Government's Exhibit 126 for identification received in evidence.)

Mr. Wright: And 127, the answer to No. 7.

(320) (Government's Exhibit 127 for identification received in evidence.)

Mr. Proskauer: Mr. Wright, with the Court's permission, when it comes to 127 and 128 exhibits, it is very important that I should make clear that your description is not before the Court because of a flagrant error in describing "The most profitable 1943-44 feature," where the question is "The feature with the greatest number of bookings." That distinction is very significant in certain aspects of this

Mr. Wright: That is quite correct. The actual feature selected is the one which had the greatest number of domestic billings in each case. The words "most profitable" were used as a shortened expression. It may not be accurate. I might say that at the time this list was submitted to the defendants, we wrote them we were going to have this printed for the benefit of the Court and themselves and suggested that if there were any descriptions or changes they wanted made before the list was printed, we would have been glad to incorporate them, so that the responsibility for such matters as this, I think, rests on both sides.

Mr. Proskauer: I trust your Honors will draw no inference in this case, from the observation of my adversary just made. If they want to get into a controversy about what occurred extrajudicially with reference to these descriptions, I am advised by my associates that we suggested a number of corrections, which were not made, but I do not

(321)

see any point in pursuing that or having this question raised here.

Judge Hand: All right.

Mr. Wright: The next offer is the answers to interrogatories 8, 9 and 10, which appear in Exhibit 128.

(Government's Exhibit 128 for identification received in evidence.)

Mr. Wright: This answer to 11, which is described on page 69, also appears in Exhibit No. 126, which has already been offered and received and is offered as a part of that exhibit. And the same is true with reference to the answers to Nos. 12 and 13, which are contained in 125 and 129, the admissions of fact.

Judge Hand: Mr. Wright, has this 126 (11) already been offered?

Mr. Wright: That is offered. 126 contains the answers to both 6 and 11 and both are offered and, I believe, have been received. The same is true as to 125, which contains the answers to both interrogatories 4, and 12 and 13.

Then we offer the admissions of fact, which are marked as 129.

(Government's Exhibit 129 for identification received in evidence.)

Mr. Wright: And the answers to 55, 56, 57 and 58, which appear in 116, are also offered, and, I believe, that has been
(322)
admitted.

That brings us to the answers of Columbia, the first of which is No. 130.

(Government's Exhibit 130 for identification received in evidence.)

Mr. Wright: And I assume that that No. 5 may also—

Judge Hand: We had a talk last evening, Mr. Wright, after our session, in regard to these independents and it is all right to put these things in now, so far as they conform to the rules that we have been applying in the other exhibits, but you have absolutely got to show something more definite than you have about these independents or we shall dismiss, in regard to them, on their motion; and that is for you to show at the time, but it is utterly unclear to us now what they have to do with all this.

Mr. Wright: We certainly would expect you to dismiss them if nothing more were offered than their interrogatory answers. This is merely background.

Judge Hand: All right.

Mr. Wright: I take it the answer to 5, contained in No. 130, would be excluded in accordance with the prior ruling because it relates to indebtedness, and that would also apply to No. 6, No. 7, No. 8, No. 9 and No. 10.

Judge Goddard: Are these to be excluded?

Mr. Wright: As I understood the prior ruling, yes.
(323)

11 and 12.

Judge Hand: How about 131, 6 there?

Mr. Wright: That would go out also.

Judge Bright: Did you say 9 and 10 also?

Mr. Wright: 9, 10, 11 and 12.

Then we offer 131, which contains the answer to interrogatory 14 on gross income.

Judge Hand: 15 goes out under your stipulation; doesn't it?

Mr. Wright: Yes, I believe that 15 through—

Judge Hand: Also 16, 17 and 18?

Mr. Wright: I believe that all the information all the way from 15 through 24 may go out from 130.

(Government's Exhibit 131 for identification received in evidence.)

Mr. Wright: And we are offering the rest of the data on pages 72 and 73, which appears in their answer to 130.

Mr. Caskey: Mr. Wright, will you state now what in 130 you have offered, beginning on page 70?

Mr. Wright: The answers to No. 1, 2, 3, 4, 13, 51, 53—

Judge Bright: 14 is in too, isn't it, Mr. Wright?

Mr. Wright: 14—I beg your pardon. That is another exhibit, that is in No. 131.

Judge Hand: It appears that you have got it listed here, (324)

so I have marked it admitted.

Mr. Wright: It is admitted but in Exhibit 131 instead of 130.

Judge Hand: What is admitted between 4 and this 131-14, anything?

Mr. Wright: 13.

Judge Hand: I marked it excluded.

Mr. Wright: I think it may be excluded.

Judge Hand: I think it ought to be.

Mr. Wright: Then, after 14, the answers that appear on 72 and 73, I can read them.

Judge Goddard: The answer to interrogatory 27?

Mr. Frohlich: I object to it—on page 72, with reference to shorts.

Mr. Wright: All right, that may go out.

Judge Bright: 27 and 28—

Mr. Wright: 27 and 28.

Judge Bright: (Continuing)—they are excluded?

Mr. Frohlich: And 22, 23, and 24, I think are out. We have no connection with any—

Mr. Wright: They are already excluded.

Judge Bright: They have been excluded.

Mr. Wright: The next exhibit is 132.

Judge Bright: On page 73, in evidence are the answers to 31 and 35?

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Mr. Wright: I beg your pardon?

Judge Bright: On page 73, the answers to interrogatories 31 and 35 are introduced in evidence? Have you offered them?

Mr. Wright: Yes, that is correct.

(Mr. Frohlich: And I understand they are subject, your Honors, to the same objections that were made heretofore and the same ruling?)

Judge Hand: Yes. We have admitted that sort of evidence in all cases.

Mr. Wright: And 132 is the next exhibit offered, which contains the answers to 38 and 39 and also the answer that is listed there to 40(a), (b), (d), (e) and (f).

(Government's Exhibit 132 for identification received in evidence.)

Mr. Wright: 40(c) should also appear as admitted as part of Exhibit 130.

And the next exhibit is 133, which contains the Columbia answers to 40(g) to (j).

Mr. Frohlich: Same objection, if the Court please, that the choice of those two cities by the Government is not a true picture of the activities of this defendant.

Judge Hand: Overruled.

Mr. Proskauer: Your Honors, may I call attention to a curious situation in which we find ourselves with respect to (326)

these interrogatories? We have never seen them. The interrogatories of the five defendants have been exchanged among one another very lightly, but the interrogatories and the answers thereto of these three so-called independent we have never seen and we haven't the remotest idea what is in them, excepting as we may infer it. The point of my rising is to urge that the Government physically offer these interrogatories and at least furnish us with access to them or copies of them, otherwise we are just in the dark as to what is going in here.

Mr. Wright: Certainly there can be no question about their access to them. I do not believe we have extra copies in either case. I think probably the defendants who fur-

nished them themselves will have extra copies which they would be willing to make available, and, of course—

Mr. Raftery: We are in the same position. We have never seen any of the evidence that went in yesterday, and I think—

Mr. Proskauer: Your Honors will glean from that what the degree of cooperation is in the moving picture industry. The five main defendants never let one another see their interrogatories until, oh, some time quite recently. We have never seen the three, and the three have never seen ours, but it is all in the pot now.

Judge Hand: If you are as unsophisticated and innocent as your remarks indicate—

(327)

Mr. Proskauer: I am.

Judge Hand: (Continuing)—why, you will have to establish a clearing house for information among the independents and yourselves.

Mr. Proskauer: We are just that unsophisticated. But what is happening here is, evidence is being offered which we haven't seen, and I wish some assurance from the Government that at least we will have access to it.

Mr. Wright: You have that assurance.

Judge Hand: Of course they have access, and, of course, the query might arise whether anybody has ever seen them.

Mr. Proskauer: And that gives rise to the speculation as to whether the Court is ever going to see them.

Judge Hand: I am very skeptical about that—long exhibits!

Mr. Wright: We will next offer the five volumes marked 133-1 through -5, which are the answers to interrogatory 48, which are separately bound.

(Government's Exhibits 133-1 through 133-5 for identification received in evidence.)

Mr. Wright: Then that brings us to 134. We offer 134, the answer relating to Philadelphia—

Mr. Frohlich: Philadelphia, Mr. Wright?

Mr. Wright: That is your Philadelphia answer.

(328)

(Government's Exhibit 134 for identification received in evidence.)

Judge Hand: 41 and 42 go out?

Mr. Wright: Right; also the items at the top of page 75, the answers to 43, 44, 45 and 46. The schedule G referred to on page 75 and the other answer to 48, I believe, is physically incorporated in Exhibit 133, already admitted, and is offered as a part of it.

The information listed there on page 76 as to 133-1, 2, 3, 4 and 5 is already in.

134 is in.

135 is a supplement to the New York City answer, which we will now offer.

(Government's Exhibit 135 for identification received in evidence.)

Mr. Wright: And we will offer 136, their answer to the first 1945 interrogatory.

(Government's Exhibit 136 for identification received in evidence.)

Mr. Wright: 137.

(Government's Exhibit 137 for identification received in evidence.)

Mr. Caskey: May I see 138 before it goes in?

Mr. Wright: Yes, indeed.

Your Honors, will note that that statement of film rentals (329)

includes only Fox, Loew, RKO and Warner. As I understand it, a later statement was furnished for Paramount, after this list had been made up.

Mr. Caskey: It is objected to on the ground of competency; not the best evidence, no foundation for its admission has been laid.

Judge Hand: What is this?

Mr. Caskey: It is a hearsay statement by somebody.

Mr. Wright: The statement is as follows: "Columbia's answer to interrogatory"——

Mr. Caskey: Just a moment, Mr. Wright? Will you hand it up instead of reading it into the record, until it is ruled on?

Judge Hand: What is this statement in pencil here, "Paramount five largest"——

Mr. Wright: That is additional data that was to come. I think that is all that note means on there.

Judge Hand: Who furnished this?

Mr. Wright: The defendant Columbia.

Mr. Caskey: We have no information as to how they classified those theatres, what theatres Columbia consider affiliates of Fox or not. This is testimony by some unknown person that some theatre affiliates are defendants.

Judge Hand: Overruled.

(Government's Exhibit 138 for identification received in evidence.)

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Mr. Wright: No. 4, which is the answer to interrogatory 4, which is part of 138, I assume is excluded?

Judge Hand: 4 and 5, is that right? 4 and 5 go out?

Mr. Wright: That is right.

No. 139 is next. Those are the answers of Columbia to 1945 interrogatories, 6 through 11.

(Government's Exhibit 139 for identification received in evidence.)

Mr. Wright: The answers to interrogatories 55, 56, 57 and 58 that were a part of 130 are already in evidence, I believe; and are offered.

As to United Artists, the first is No. 140 for identification, containing the answers to No. 1, 2(a)2, and 3 to 24 inclusive—

Judge Hand: Now, 3 goes out, doesn't it?

Mr. Wright: Well, no, I do not think that 3 does. I think what we excluded heretofore was 5, 6, 7, 8, 9, 10, 11 and 12.

Judge Bright: And 13?

Mr. Wright: 13, 14 and 15 I believe stay in.

Judge Hand: What have the answers got to do with it?

Mr. Wright: Well, again it is information as to the management and character of the company. It happens to be a (331)

closed corporation controlled by—

Judge Hand: What have the answers got to do with it? Well, all right, let it stay.

Mr. Wright: We will have agreements in evidence here later, and I suppose it is important to show who these people were.

Judge Hand: All right.

Mr. Raftery: Mr. Wright, are you leaving in 13 or excluding it? You excluded it as to Columbia. I just thought I heard you say you are leaving it in.

Mr. Wright: If it was excluded as to Columbia it should be excluded here.

Judge Bright: You did exclude it as to Columbia.

Mr. Wright: Then it is out here.

Judge Hand: 13, 14 and 15 are in?

Judge Bright: 13 is out.

Mr. Wright: And I believe 16 through 24 may also go out.

Judge Hand: 14 is admitted?

Judge Bright: 14 and 15 are in.

You offered 14 and 15 and excluded 16 to 24, is that right?

Mr. Wright: Correct, your Honor. And we also offer the negative data that is contained in the answers to interrogatories 51 and 53, and 25 to 28, 31, 35, 38 and 39, and

(332)

also contained in 140; and we also offer the answer as to distribution of features in interrogatory No. 40(a), 40(b), 40(d), 40(e) and 40(f), also contained in 140.

(Government's Exhibit 140 for identification received in evidence.)

Mr. Wright: Then we offer United Artists' answers, No. 141, the 1939 distribution data, which should exclude, I believe, No. 42, No. 43, No. 44, No. 45——

Judge Bright: And 46 on the next page?

Mr. Raftery: How about 46, Mr. Wright?

Mr. Wright: And 46.

(Government's Exhibit 141 for identification received in evidence.)

Mr. Wright: Then we will offer 142, the answer to 48 with respect to Kansas City.

(Government's Exhibit 142 for identification received in evidence.)

Mr. Raftery: United Artists wants to preserve a general objection to this limited evidence.

Judge Hand: All right.

Mr. Wright: Then we will offer 143. They are 1945 answers to questions 1 and 2.

(Government's Exhibit 143 for identification received in evidence.)

Mr. Wright: And 144——

(333)

Mr. Caskey: May I see that, please?

Mr. Wright: You want to see 144 or 143?

Mr. Caskey: 144.

(Exhibit 144 for identification handed to Mr. Caskey.)

Mr. Wright: They are the '45 answers to questions 3, 4 and 5. I take it 4 and 5 will be excluded.

Mr. Raftery: Mr. Caskey, even though you are looking at it, we trust you will treat those rentals as confidential.

Mr. Caskey: I make no such representation. If it is admitted in evidence, I assume it is in evidence for whatever purpose, but I object to it. At considerable effort the defendant National Theatres Corporation prepared a chart showing the amount of moneys which it paid to United Artists, and that is in evidence as Exhibit 43. Now, this purports to give a figure on a somewhat different basis. The figure is different by the extent of some \$50,000. We did not prepare it, and we object to it on the ground that it is incompetent.

Mr. Wright: That 144 also contains—

Judge Hand: Well, we will receive that.

Mr. Wright: —the answers to interrogatory 7, which we are also offering. That is described on page 83.

(Government's Exhibit 144 for identification received in evidence.)

Mr. Wright: This data that is listed here is not having (334). been furnished, I believe, is either to be furnished, or some of it has been furnished since the list was printed and will be given a later number and offered later.

Mr. Raftery: I did not quite hear that.

Mr. Wright: I said I understood that some of this data that were listed here as not having been furnished when the list was made up will subsequently be furnished and will, of course, be given a later number and offered.

We offer 145, which is the United Artists' admissions of fact.

(Government's Exhibit 145 for identification received in evidence.)

Mr. Wright: And we are also offering that part of 140 already received which gives the answers to interrogatories 55, 56, 57 and 58.

Judge Hand: How about No. 6?

Mr. Wright: That is merely an informative statement.

Judge Hand: Have you offered it?

Mr. Wright: No, we have not.

Judge Hand: Oh, it is merely an informative statement in this record?

Mr. Wright: That is all.

Judge Hand: All right. Now, 7 is in, is it?

Mr. Wright: Correct.

(335)

Mr. Raftery: Mr. Wright, you also stated that you have since received——

Mr. Wright: At least a part of it, yes, and it will be numbered and subsequently offered.

Mr. Raftery: Thank you.

Judge Hand: You mean as to 6, the material you are talking about?

Mr. Wright: Yes, that that data has subsequently come in and will be numbered and offered.

Judge Hand: Then you had better just strike out 6, hadn't you?

Mr. Wright: It means nothing. It may be stricken out.

Judge Hand: As much stuff as means nothing may be excluded. We are in favor of excluding it.

Mr. Wright: The only purpose of putting it there was to explain the absence of the material.

Judge Hand: Oh, it was all right at the time. Now, 8 to 13—I have marked admitted, is that right?

Mr. Wright: No, there is nothing offered there, because it had not been submitted or marked. That again is just an informative note there on 8 to 13.

Judge Hand: All right. Shall we strike it out?

Mr. Wright: That is agreeable.

Mr. Raftery: Is 12 offered or withdrawn, Mr. Wright?

(336)

Mr. Wright: 12?

Mr. Raftery: On page 84.

Mr. Wright: Your answer to 12?

Mr. Raftery: Yes.

Mr. Wright: No, that has not been offered.

Judge Hand: When are you going to offer that?

Mr. Wright: Well, as soon as we have the rest of the United Artists—

Judge Hand: Do you think it can go in here?

Mr. Wright: I do not think we have all of the United Artists' material yet that was to be furnished in response to interrogatories. We have almost all of it. As soon as we get it all we will offer it.

Mr. Raftery: The answer to 12 was none, and the answer to 13 was zero.

Mr. Wright: That is right. I was mistaken. These interrogatories were in general terms. 12 and 13 were submitted to all eight defendants, but they obviously have application only to the five theatre-owning defendants.

Judge Hand: Now, you come to 140, don't you?

Mr. Wright: That, as I say, that exhibit has already been admitted and we are offering these answers to 55, 56, 57 and 58, which are a part of that exhibit.

And that brings us to Universal, I believe. The first exhibit is 146, which I think should have excluded from it 5, 6, 7, 8, 9, 10, 11, 12 and 13.

(337)

Judge Hand: 1, 2, 3 and 4 go in?

Mr. Wright: That is correct.

Judge Hand: The others are out?

Mr. Wright: Yes.

Then on page 86 the data that goes out, I believe, is 16 through 24.

Judge Hand: How about 14?

Mr. Wright: 14 we offer.

Judge Hand: Admitted. 15 is excluded, isn't it?

Mr. Wright: 15 I think in this case shows an interest in a production subsidiary which is one of the group of corporations that make it up. I think it should be in.

Mr. Rafferty: What you are talking about is one of the affiliated defendants of Universal? That is one of Universal's own companies?

Mr. Wright: Yes.

We are also offering the answers to 51 and 53 contained in the same exhibit, and 25, 26, 31, 35, 38 and 39.

Judge Hand: All the rest after 26 go out?

Mr. Wright: No. Just 27 and 28 go out. 31, 35, 38 and 39 are in. Then down at the bottom of the page of 146, 41 and 42 would be out.

Mr. Rafferty: As to 40 we want to preserve the general (338) objection as to limitation.

Judge Hand: Overruled.

Mr. Wright: I haven't got to that exhibit yet. Still on 146, the items on page 88, all of which relates to shorts and newsreels, I assume are out.

Judge Hand: 41 and 42 are out.

Mr. Wright: 41, 42, 43, 45 and 46 are out.

Then as to the data in 146 which appears on page 89, we are offering that. That is, the answers to 55, 56, 57 and 58.

Judge Bright: Do you offer the answer to 48 on page 88?

Mr. Wright: We have not come to—

Judge Bright: That is 146.

Mr. Wright: That is in a separately numbered exhibit. 146-2 is a different exhibit from 146.

(Government's Exhibit 146 for identification received in evidence.)

Mr. Wright: The next one we will offer is 146-1 which appears on page 87.

Mr. Raftery: That is the exhibit as to which we wish to preserve the general objection.

Judge Hand: Admitted.

(Government's Exhibit 146-1 for identification received in evidence.)

(339)

Then we shall offer 146-2 which appears on page 88 and contains the answer to interrogatory 48 that Judge Bright just referred to.

(Government's Exhibit 146-2 for identification received in evidence.)

Mr. Wright: And then we offer 147, the Universal admissions of fact.

(Government's Exhibit 147 for identification received in evidence.)

Mr. Wright: Then we offer 148 which relates to one of the Universal subsidiaries, Big U Film Exchange. I think there the data as to 5, 6, 7, 8, 9, 10, 11, 12 and 13 may go out.

Mr. Raftery: In fairness to Mr. Wright, there has been a corporate change in the intercompany relationship between Universal and Big U. Before the day is out we will submit to you a document showing that corporate change. Big U, I understand, is now out of existence.

Mr. Wright: All right.

Mr. Raftery: There has been an amendment of the charter of the parent company and some kind of a merger—I do not know what it is, but we will give it to you.

Mr. Wright: Whatever it is it will be put in the record.

Mr. Raftery: That is right.

(340)

Judge Hand: Now, Mr. Wright, what are you putting in here of 148?

Mr. Wright: The reason we put this in—

Judge Hand: No. What is it you are putting in?

Mr. Wright: 1, 2, 3 and 4, and No. 14. The rest I think may be excluded.

Judge Bright: You mean 15 to 24 is out?

Mr. Wright: Yes.

Judge Hand: Also 5 to 13 are out?

Mr. Wright: Correct.

Now we are offering the parts of 148 containing the answers to interrogatories 51 and 53 relating to theatre interests. The production answers are negative, and I think those may be excluded. Those are the answers to 25 to 28 inclusive, Nos. 31, 35, 37 and 38.

Judge Hand: Excluded?

Mr. Wright: Yes.

The history part down at the bottom of the page, the answers to 55, 56, 57 and 58 are answered. They are in 148.

Judge Bright: I did not hear what you said.

Mr. Wright: We are offering the answers to interrogatories 55, 56, 57 and 58 that are contained in 148 described at the bottom of the page there.

Judge Hand: What are you doing with 146, 146-1, 146-2, interrogatories 40 to 46 and 48?

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Mr. Wright: Those interrogatories have already been offered. This is merely an explanatory note to the effect that those answers cover the distribution activities of this Big U Film Exchange as well as of Universal Film Exchanges, Inc. That is the only purpose.

Judge Hand: You may leave it in or strike it out.

Mr. Wright: Well, I think the note is just there for informative purposes.

Judge Hand: All right. Now, 148.

Mr. Wright: That is offered as to 55, 56, 57 and 58, and also as to 1, 2, 3, 4, and 14, and 51 and 53; which were previously covered.

(Government's Exhibit 148 for identification received in evidence.)

Judge Hand: Next is 149, page 92.

Mr. Wright: I now offer 149.

Judge Hand: What part of it? There are all kinds of subdivisions.

Mr. Wright: We can strike out 5, 6, 7, 8, 9—well, in this case the picture is incomplete if you strike out 9, because I think this is the holding company that does hold stock in other defendants which are part of the Universal group.

Judge Bright. Strike out 5 to 8 inclusive?

Mr. Wright: Yes. 10, 11, 12 and 13 may go out. 15 (342)

I believe should stay in as it shows the interest in certain subsidiaries.

Judge Bright: Is 14 in too?

Mr. Wright: Yes, 14, 15 and 16—

Judge Hand: You want 9, 10 and 11, do you?

Mr. Wright: 9 is in. 10, 11, 12 and 13 are out. 14, 15, 16 and 17 takes care of the Universal subsidiaries. Those should be in. Then I think the answers 18 through 24 may go out.

We are also offering—

Judge Hand: Now wait a minute, Mr. Wright. With respect to 149, 1 is admitted; 2 is admitted; 3 is admitted; 4 is admitted; 5, 6, 7 and 8 are excluded; 9 is admitted?

Mr. Wright: Yes.

Judge Hand: 10 excluded?

Mr. Wright: 10, 11, 12 and 13 are excluded.

Judge Hand: Yes, 10, 11, 12 and 13 are excluded. How about 14?

Mr. Wright: 14, 15, 16 and 17 admitted.

Judge Hand: And the rest excluded?

Mr. Wright: That is correct.

Mr. Rafferty: Mr. Wright, you used the expression "Universal group." What you meant were the Universal subsidiaries.

Mr. Wright: Yes.

(343)

Mr. Raftery: And this offer of 9 and the others is merely to show the company relationships to its own subsidiaries?

Mr. Wright: Correct.

Then we also offer the negative statement as to theatre interests appearing in 149. That is in answer to interrogatories 51 and 53. The item at the top of page 94 is merely an explanatory note, and that is true of the next item under distribution. We are offering the history answers under 149. That is, 55, 56, 57 and 58.

(Government's Exhibit 149 for identification received in evidence.)

Mr. Wright: Then we are offering Exhibit 150, which is the answer of Universal Film Exchanges, Inc., except that I believe the answers to questions Nos. 5, 6, 7, 8, 9, 10, 11, 12 and 13 may go out there. 14 which appears at the top of page 96 I think should be in. I believe the rest may go out.

Judge Hand: 14 should be in?

Mr. Wright: Yes.

Judge Hand: The rest out?

Mr. Wright: Yes, 15 to 24 inclusive, out.

(Government's Exhibit 150 for identification received in evidence.)

Mr. Wright: Then we are also offering the negative statement as to theatre interests appearing at the top of page 97.

(344)

That is, the answers to interrogatories 51 and 53 which are part of 150. The next items are merely explanatory notes down to history, and we are offering the answers to 55, 56, 57 and 58 which appear in 150.

Now, on this list there are further interrogatory answers listed which came in at a later date and are included in the supplemental list. I think most of those are in Exhibit No. 349 which may as well be offered at this time. That is an

admission of fact which came in from Columbia. It appears on page 115 of the list you have there. That 349 is additional interrogatory data received from Columbia, and I understand their data is still incomplete, but further data will be numbered and offered as received.

Mr. Frohlich: Mr. Wright, I understand that our admissions of fact are complete.

Mr. Wright: For the whole 92 cities? I thought we just got them for the 73 cities, and then you were going to give us the other 19.

Mr. Frohlich: The 92 you have got there.

Mr. Wright: All right, if they are there, they are there. They are all offered.

Judge Hand: You had better not have that statement of yours in there, because if you find that it is borne out afterwards, why, you can correct it, but there is no use of having something in there that might mislead somebody.

(345)

Mr. Wright: I think that is quite correct. I may as well verify this now. (Counting.)

Mr. Frohlich's statement appears to be correct. There are 92 covered there.

(Government's Exhibit 349 for identification received in evidence.)

Mr. Wright: Then the remaining interrogatory answer material that is identified on this list I think appears in Exhibit 359, which was supplemental data received with respect to National Theatre holdings. I think, however, that letter, in turn, has been superseded by a later list, and we should probably offer the list instead of this reconciliation letter.

Mr. Caskey: That is correct.

Judge Hand: Then you do not offer 359? You withdraw it?

Mr. Wright: I withdraw 359. I was just going to suggest assigning the same number for convenience, if you have that theatre list here. (Conferring with associates.)

My associate has called my attention to the fact that the newest and superseding list has been given a number that we had not reached, and it will be offered in due course. But this 359 is withdrawn.

360, I believe, gives supplemental data on the Paramount interrogatories; and the same is true of 361. These relate to theatre interests written in response to efforts or (346)

letters on our part made to reconcile certain discrepancies. They really supplement the Paramount information as to theatre ownership. We offer those, 360 and 361.

Judge Hand: They both relate to theatre holdings?

Mr. Wright: 360 relates to Paramount theatre holdings; and 361 supplies data with respect to license fees paid by certain Paramount theatres and theatre grosses which had been omitted from prior interrogatory answers.

(Governments Exhibits 360 and 361 for identification received in evidence.)

Mr. Wright: Then 362 contains answers of Universal to 1945 interrogatories, one through 5; and I assume under the Court's prior ruling, Nos. 4 and 5 relating to shorts and newsreels would be excluded. The rest is offered.

Mr. Caskey: If your Honors please, this is objected to on the same ground; lack of competency. There is a discrepancy of \$300,000 between this evidence tendered without any support and Exhibit 43.

Judge Hand: Overruled.

(Government's Exhibit 362 for identification received in evidence.)

Mr. Wright: I believe that completes the sworn interrogatory answers on the printed list. There also are some additional answers to interrogatories that were propounded (346a)

at the time the suit was filed, informally, which I should like

to offer next. Those are listed here. The first one is No. 151, which appears on page 98.

(347)

Judge Hand: What about these 150, 155, 156, 157 and 158, were they excluded or admitted?

Mr. Wright: No. 150, 155, 156, 157 and 158, as I understand it, were offered and admitted.

Judge Hand: I suppose they would be. Same thing.

Mr. Proskauer: What did you say, Mr. Wright?

Judge Hand: Now, 151, you have come to, haven't you, page 98?

Mr. Wright: That is what is currently being offered together with 152, the letter of transmission. That is a list of Paramount theatre holdings by States and by years, from 1932 through 1938.

(Marked Government's Exhibits 151 and 152 in evidence.)

Mr. Wright: And 153 is, I believe, a similar tabulation covering the period 1933 through 1938, submitted by National Theatres Corporation, and 154 is a list of National Theatre holdings, dated November 30, 1937, which was also submitted—

Mr. Caskey: May I see that, please?

Mr. Wright: Yes, surely.

Mr. Caskey: This, your Honors, we are constrained to object to. Not in answer to any interrogatory. We have no copy in our files.

While the gray book indicates it was furnished by Fox, and that may be true, we certainly have no knowledge what-
(348)

soever of that fact. It is also wholly immaterial inasmuch as it duplicates other more reliable data, and we object to it on the ground of competency and on the ground of materiality.

Mr. Wright: We certainly withdraw it, if there is any question at all as to who furnished it. I had supposed there was no doubt on that score.

Judge Hand: Withdrawn.

Judge Goddard: What is that?

Judge Hand: 154.

Mr. Wright: Then we will offer No. 156, the Warner Theatre list as of 1945, together with 157, which is a supplementary letter referring to the list.

Judge Hand: 156 and 157?

Mr. Wright: Yes.

(Government's Exhibits 156 and 157 for identification marked in evidence.)

Mr. Wright: And we will also offer 158, the RKO list, as of December 31, 1944, with a supplementary letter from RKO's counsel referring to that list.

(Government's Exhibits 158 and 159 for identification received in evidence.)

Mr. Wright: We are now offering, if the Court please, No. 160, which is listed here as Fox's list of theatres as of July 1945. That should be changed to "as of August 1, (349) 1945," which is the last list submitted and which we substituted for the July list.

Mr. Caskey: It should also be changed to "National's list of theatres."

Mr. Wright: All right. National is one hundred per cent owned by Fox.

(Government's Exhibit 160 for identification received in evidence.)

Mr. Wright: Then 161 is the Paramount 1945 theatre list.

(Government's Exhibit 161 for identification received in evidence.)

Mr. Wright: It is being offered with 162, which is a supplementary letter from Paramount counsel, referring to the list.

(Government's Exhibit 162 for identification received in evidence.)

Mr. Wright: And 163 is the Loew 1945 list of theatre holdings.

(Government's Exhibit 163 for identification received in evidence.)

Mr. Wright: The next general category of documents that I would like to offer—

Judge Goddard: The next is 155.

Mr. Wright: 155 are these reports which we will deal (350)

with later because there is still a matter of controversy as to how far they are willing to go in admitting them. I would rather next proceed to the offer of license agreements.

The license agreements begin on page 100, the first number there being, I believe, No. 172. These 1936-1937 agreements were not in our possession when the list was prepared. These summaries and our data came from agents' work sheets who had examined them in the companies' files, and so we have asked them to produce the documents themselves, and have to rely on their copies for the actual introduction of the material in evidence.

Have you 172?

Mr. Seymour: Are you offering 172?

Mr. Wright: Yes.

Mr. Seymour: If your Honors please, it seems to me again we are getting into an area of matter of such doubtful materiality and relevancy that perhaps we can save our

selves some time and some of the record by considering it. Here is an agreement made in 1927 which expired in 1937, between two of the defendants, that is, between Loew and the predecessor of the defendant Paramount. There is no proof and will be none that such agreements have been made since 1937 because it is simply an expired agreement. Under the consent decree, while that provision was in force, this (351)

method of selling pictures could not be followed. It is true that provision has lapsed but, in the absence of some evidence of the continuation of such franchises or such agreements, it would seem to me that expired agreements were pretty immaterial.

Finally, there cannot really be any question about the legality of franchises aside from this consent decree. Because I think about 1936 or 1937 the Government itself in a suit in this court insisted that two of these defendants give ten-year franchises, and this was a ten-year franchise to certain theatres in St. Louis as a condition of dismissal of the Government's suit. That is *United States v. Warner Brothers*. Both the granting of a franchise and the dismissal were approved by Judge Knox. So it seems to me this sort of stuff is just encumbering the record.

Mr. Wright: If the Court please, this agreement is, of course, the very stuff of which the case is made, the agreements made between these various producer-exhibitor defendants. While it is true that this agreement expired with the 1936-1937 season, it was an agreement which functioned over this ten-year period and is one of those which help to set the pattern that we are now concerned with and clearly—

(352)

Judge Hand: We will admit it.

Mr. Gillespie: Your Honor, we note a similar objection on behalf of Loew's.

(Government's Exhibit 172 for identification received in evidence.)

Mr. Wright: We next offer 173, which is——

Judge Hand: The same objection is made to 173 and it is overruled.

Mr. Seymour: It applies to the next few exhibits, and may it be deemed to apply to all of them, that is, your Honor's ruling apply to all of them, so I won't have to repeat the objection?

Judge Hand: Yes. Are all these exhibits of the same nature on pages 100 and 101; and exhibit numbers for identification 193 and 194 on 102?

Mr. Wright: That is correct. Insofar as they are all film license agreements made between two or more of the defendants in the case, that is right.

Judge Hand: They should be admitted, I should think, and marked, subject, of course, to these objections.

Mr. Seymour: There is one other question that is not really an objection. I just want to mention it now so your Honors will note it. The heading at the top of page 100 is, as called by the Government, "representative agreements." There is no basis for that characterization that I know of. It (353)

is just an argument and I hope your Honors will treat this like the other descriptive materials——

Judge Hand: Oh, yes.

Mr. Seymour:——as a mere contention. If they are representative, then there must be proof of others.

Mr. Proskauer: In that connection, your Honors, you will observe, when you come to the Warner licensing agreements, that they are for short periods, one year, two years. They are not at all of the same pattern as the ten-year licensing agreements and, in truth, there is no representative master licensing agreement. When you look at these you find that they all differ.

Mr. Wright: It is perfectly agreeable to me to strike the word "representative" from the list. It obviously——

Judge Hand: Granted.

Mr. Wright:—is not evidence anyway. The purpose of the word "representative," in the first place, was merely to indicate to the Court that these weren't all of these agreements that were made between the defendants.

Judge Hand: Oh, yes.

Mr. Wright: But a selected sample.

Judge Hand: You offer 174, 175, 176, 177, 178, 179, 180, (354)
181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193
and 194?

Mr. Wright: Correct.

Judge Hand: All right. They are admitted subject to these objections.

Mr. Caskey: My objection to 178 is to the description, not as to the document. The document relates to a franchise to one theatre in Portland, Oregon, in which a subsidiary of Paramount, then in bankruptcy, had an interest. It was leased by Fox West Coast, or a subsidiary thereof and, as a part of the lease, with the approval of the bankruptcy court, the franchise was entered into, and I think that is scarcely to be gleaned from the description of Exhibit 178 in this gray book.

Mr. Wright: The description is for identification purposes only, and obviously the exhibit speaks for itself.

Judge Hand: Are they marking these?

The Clerk: I don't have them.

Mr. Wright: Have you these agreements that we have just referred to? They were to be produced by the respective defendants. We notified them, of course, and agreed that as between themselves, either party to the agreement could produce it that it was convenient for. I do not know that the time of the Court need be taken up with the actual marking, (355)

if they haven't them here, for example, ready to go in.

Mr. Proskauer: Have you copies?

Mr. Wright: I do not think, as far as I know, that we have copies in our possession of any of these unless they have been made within the last few days.

We do not have 174. Have you got one?

Mr. Proskauer: I have a photostat of 175. We are looking for 174.

Mr. Wright: These may as well be marked.

Mr. Seymour: Here is 174.

Mr. Wright: Here is 174, to be marked.

Mr. Proskauer: You have a copy of 174, have you, Mr. Wright?

Mr. Seymour: Yes, I gave it to him.

Mr. Proskauer: Very good.

(Government's Exhibits for identification 172, 173, 174 and 175 received in evidence.)

(355-A)

Mr. Wright: I believe 172, 173, 174 and 175 are marked 176, we have no copy of.

Mr. Seymour: We have no copy of that.

Mr. Wright: How about RKO?

Mr. Leisure: We have no copy.

Mr. Seymour: We are told that was burned up in a fire of the RKO warehouse.

Mr. Wright: As I understand it, then, neither defendant has a copy of the document described as Exhibit 176 for identification, neither RKO nor Paramount?

Mr. Leisure: Nor the Government.

Mr. Wright: In that event I suppose we will have to offer the agents' worksheets of the summary of the agreement which was made by them when they examined the originals. I will note that as missing.

Judge Bright: 176 is missing?

Mr. Wright: 176.

Mr. Seymour: May we see what you are having marked?

Mr. Wright: 176, as I understand it, the defendants say they are unable to produce, that is, neither Paramount nor RKO can locate the agreement.

Mr. Seymour: Are you marking anything?

Mr. Wright: The ones that have been marked in evidence are 172, 173, 174 and 175.

We now would like to offer 177 and 178.

(356)

Judge Goddard: They are offered and received?

Mr. Wright: They are all offered and received. It is simply a question of marking, as I say. I believe that that has to be done in the presence of the Court.

Judge Hand: That is true. I always fear when we leave you people for a minute that you won't be sawing wood and getting your record in, and we propose to have this thing go just like that. We are not going to stand any other system here. Ties up too many judges.

Mr. Wright: There are limits to the extent to which we can organize this thing. We did not have the agreements. We asked for them and asked to have them produced.

Judge Hand: Do not discuss it now. Go ahead and put in your proof.

Mr. Wright: Has Paramount 177, 178 and 179?

Judge Goddard: I think it is 176 you were looking for?

Mr. Wright: 176, they tell us, they cannot find; that neither party has any record of it; they think it is burned up or something.

Will anybody who has a copy of any of these agreements come forward, and see if we can get the others marked? This is 177.

(Government's Exhibit 177 for identification received in evidence.)

(357)

Mr. Caskey: Have you 178?

Mr. Wright: I would like a copy, if you have it.

Mr. Proskauer: May I suggest to your Honors while we are marking those, that I don't want the Court to get the impression that these are general licensing agreements between these two companies covering their entire area. For

example, 178 is an agreement between Paramount and Fox West Coast relating to one theatre in Portland, Oregon.

Judge Hand: I know; I understand.

Mr. Wright: 178, the last one.

(Government's Exhibit 178 for identification received in evidence.)

Judge Hand: You have 178 and you are marking it?

The Clerk: 178 is marked.

Mr. Wright: Has anyone 179?

(Government's Exhibit 179 for identification received in evidence.)

Mr. Wright: 180. Have you it there? He says you have 180.

Mr. Caskey: 180? No, sir, we haven't 180.

Mr. Wright: Have you made a search for it or is it just—

Mr. Caskey: Of course, Mr. Wright, we have spent six months making a search for documents in this case for you. These are ten years old.

(358)

Mr. Seymour: Why don't you pass that for the present?

Mr. Wright: All right. How about 181?

Mr. Gillespie: Mr. Wright, Loew's does not have 181. I understood Warner was to produce 181.

Mr. Wright: Is it just a misunderstanding as to who was to produce it, or has neither one of you got it?

Mr. Proskauer: I want no suggestion that we haven't produced what we were expected to. On the 1st of October, 1945, we addressed a letter to your associate, Mr. Lasser, enclosing copies of every exhibit that we were supposed to produce. They were 175, 191, 194, 259, 266 and 271.

Mr. Wright: The situation on 181 is what, Loew's has not been able to locate a copy of such agreement?

Mr. Gillespie: That was not marked on my list as one we were to furnish. I think we have the agreement, but it was just not, as I say, marked as one we were to furnish. Apparently there was a misunderstanding on that.

Mr. Wright: Then either one or the other of you will be able to furnish it? I suppose it will be marked when furnished.

Mr. Proskauer: We will make a search for it. If we can find it, of course, we will produce it.

Mr. Wright: How about 182?

(359)

Mr. Gillespie: We have 182.

Mr. Wright: May we have it?

The Court: What is this, 181?

Mr. Wright: 181 they are searching for, and 180.

(Government's Exhibit 182 for identification received in evidence.)

Judge Hand: 183—

Mr. Wright: And 184 and 185 and 186. Those are also BKO agreements. Do you have those?

(Government's Exhibits 183, 184 and 185 for identification received in evidence.)

Mr. Wright: And 186, have you that?

Mr. Gillespie: Here is 186.

(Government's Exhibit 186 for identification received in evidence.)

Mr. Wright: 187?

Mr. Gillespie: 187.

(Government's Exhibit 187 for identification received in evidence.)

Mr. Wright: And 188.

Mr. Thompson: We have not been able to find in the files of Loew anything which conforms to the description of 188.

We have not been able to find any record of any such corporation in the files of Loew's, Inc. as this Anchor Theatrical Corporation. We don't know what the license is, we don't (360)

know what the corporation is.

Mr. Caskey: Your ignorance is shared by us.

Mr. Wright: Before we leave this agreement, as I understand it, according to the summary which is contained in this appendix A and picked up on the F. B. I. worksheets, that covered the exhibition of Fox Films in the Fox Palace and Capitol Theatres in Washington, D. C. for that ten-year period. As I understand it, neither Loew nor Fox has any agreement which covered the exhibition of Fox Films in those theatres during that period?

Mr. Caskey: Certainly we didn't—I didn't make the search personally, but we are told this thing does not exist, and it doesn't ring with me. I know the operator of the Fox Theatre, the Capitol Theatre, in Washington and nothing about Anchor Theatrical Corporation approaches it.

Mr. Wright: Have you in your possession agreements which relate to the licensing of Fox films in those theatres, the Fox Palace and Capitol in Washington, D. C. for that period?

Mr. Caskey: Undoubtedly there are some agreements. Whether they are franchises or not, I don't know. We could find out. But I am certain that there has been no franchise, as you know, for that theatre since 19—since we compiled the list which we furnished you in 1940, this theatre has not been franchised. The theatre changed hands back in 1936. (361)

Before that—

Mr. Wright: Which theatre?

Mr. Caskey: The one that is in the union—now called the Capitol, then called the Palace.

Mr. Wright: I think in that case we again will have to rely on the agents' worksheets who made the examination

and took this data from the agreements that they examined in the files of the company in 1937.

Judge Goddard: What company did they find it in?

Mr. Wright: I believe that the examination at that time was made of the contracts. The contracts were then, I believe, furnished for inspection by the distributor company in each case and that the contract examined by the agent would have been one furnished by Fox Film.

Mr. Caskey: Didn't they photostat it at that time?

Mr. Wright: I think they may have photostated some of those and made the examination from photostats. We shall certainly do everything we can to locate a photostat, if there is one.

Mr. Caskey: I call the Court's attention, for the sake of the record, to the fact that Exhibit 187 relates to one theatre in the City of Los Angeles.

Judge Hand: 188, you haven't found. Now 189.

Mr. Caskey: We have it. Have you it?

Mr. Whittlesey: Yes.

(362)

(Government's Exhibit 189 for identification received in evidence.)

Mr. Wright: has Fox or RKO 190?

(Government's Exhibit 190 for identification received in evidence.)

Mr. Wright: 191 and 192. Does Fox or Warner have those?

We have a photostat of 191 to be marked.

(Government's Exhibit 191 for identification received in evidence.)

Mr. Davis: What became of 189 and 190? Did they go in?

Mr. Wright: They did. And 192, does Fox or Warner have that?

Mr. Caskey: We have it.

(Government's Exhibit 192 for identification received in evidence.)

Mr. Wright: 193 is, I believe, withdrawn. That is a duplication, I think, of 194. We offer 194, which is the agreement between RKO and Warner, dated August 31, 1945, for two years.

(Government's Exhibit 194 for identification received in evidence.)

Mr. Caskey: What exhibit are you withdrawing?

Mr. Wright: 193 is withdrawn.

(363)

Judge Hand: Now you have everything in in that section except 176 and 180, 181 and 188.

Mr. Wright: Correct.

Judge Hand: And that is all.

Mr. Wright: Correct.

Judge Hand: And you propose to supply them by oral testimony or other documentary evidence?

Mr. Wright: That is correct, your Honor.

Judge Hand: We will take an adjournment until quarter past two.

(Recess to 2.15 P.M.)

(364)

AFTERNOON SESSION

Judge Hand: Proceed.

Mr. Caskey: If your Honors please, Mr. Wright has handed me what purports to be a photostatic copy of an agreement dated August 16, 1935, between Fox Film Corporation and United Theatre Enterprises, Inc., covering the Rialto, Capitol and Ritz theatres in Macon, Georgia; and it has every appearance of genuineness, and except for the notation on the front cover, which obviously is not part of the

document itself, there is no objection. I would like to have that deleted.

Judge Hand: What is this, Mr. Wright?

Mr. Wright: This is No. 180, if the Court please, which appears on page 100 of the list. It was a document that neither of the defendants who were involved were able to locate, and we were able to locate a photostatic copy in our files.

Judge Hand: It may be admitted.

Mr. Wright: The part that Mr. Caskey does not like is a notation "Covers entire circuit" up at the top, which I just struck out in pencil.

(Government's Exhibit 180 for identification received in evidence.)

Mr. Wright: In order that there won't be any delay in producing this other material and having it marked, we shall (365)

now offer consecutively the agreements which are identified here as 195 through 274. Mr. Raftery, I believe, has 195 and 196, and he says he wants to make a speech about them.

Mr. Raftery: I do not want to make a speech. I want to call your Honors' attention to the language at the head, "Representative Master Licensing Agreements" on page 102. We don't produce either of the agreements with any representation that they are representative of anything except what is in the agreements. Now, as to the first agreement—

Judge Hand: Well, that is merely in this pamphlet?

Mr. Raftery: That is right.

Judge Hand: Why don't you strike out "Representative"?

Mr. Wright: As I said before, the only purpose is to indicate that those are not all of the agreements of that class that these people made. "Selected" is just as good a word.

Judge Hand: It seems to give them so much pain—

Mr. Wright: I am willing to have it stricken.

Mr. Raftery: Now, as regards 195, the description says "Dated February 3, 1928, for 10 years." That agreement,

by its terms, expired in 1937 in the middle of the year, but the contracting party, Publix Theatres Corporation, went into bankruptcy in late 1932 or early 1933, and the contract expired, as a matter of fact, in 1933.

(366)

Judge Hand: Yes, I understand that.

Mr. Raftery: Now, because of the remoteness of it, we wish to object to its introduction in evidence, as it has nothing to do with anything that has happened since early 1933, 12 years ago.

Judge Hand: We will admit it.

Judge Goddard: This had to do with a situation that existed before the bankruptcy, is that right?

Mr. Raftery: That is right. And also that is a printed copy not executed. The executed copy is not in existence, and where there are blank signatures not filled in in print, the parties mentioned never joined in the agreement.

Judge Goddard: They never did join?

Mr. Raftery: Mr. Chaplin never signed it.

Judge Hand: Then does that get in, Mr. Wright?

Mr. Raftery: All the other parties signed it. It was operative as to all of the parties whose printed signatures show in the agreement. This is a contract where United Artists agreed to license 15 pictures a year to the Publix Theatres mentioned therein, and it required the individual approval of the owner of each of the pictures. When the agreement was presented to Mr. Chaplin he would not approve, so his pictures were not included.

Judge Bright: All the others were?

(367)

Mr. Raftery: Yes.

Mr. Wright: The fact that he did not approve appears on the face of the agreement, because there is no showing of any signature on his part.

Judge Hand: All right, we will admit it.

(Government's Exhibit 195 for identification received in evidence.)

Mr. Wright: The other United Artists agreement in that group there, 199, has also been produced by Mr. Raftery, and that will be marked accordingly.

(Government's Exhibit 199 for identification received in evidence.)

Judge Hand: What about these prior ones?

Mr. Wright: Now, the Columbia agreements, Mr. Frohlich, have you 196 and 197?

Mr. Frohlich: We haven't got them.

Mr. Wright: You were not able to locate them?

Mr. Frohlich: I looked for them and have not been able to locate them.

Mr. Wright: Has Paramount got a copy?

Mr. Seymour: We have not yet been able to locate a copy. We shall continue our search, and suggest you pass it.

Mr. Wright: Is the same true as to 197?

Mr. Frohlich: Yes.

Mr. Wright: Is that true as to Paramount?

(368)

Mr. Seymour: Just a moment. Yes, the same observation. I suggest you pass that for the present.

Mr. Wright: 197 we will pass.

Now, 198.

Mr. Frohlich: 198 Mr. Marcus has.

Mr. Wright: I think we also have those beginning with 200 there, don't we? Let us have those while you are looking for 198.

These agreements beginning with 200 are pooling agreements relating to the operation of theatres.

Judge Hand: How about 199?

Mr. Wright: We are supposed to have a copy of it which we have not been able to locate.

Mr. Bright: 199 has been marked.

Mr. Wright: Oh, yes, 199 is in. It is 198 that we have not been able to locate.

Judge Hand: You haven't got 198?

Mr. Wright: We think we have it here, but we have not given it to the clerk for marking yet.

And I am now offering 200, a copy of which we have.

(Government's Exhibit 200 for identification received in evidence.)

Mr. Wright: And 201. 201 consists of three pieces, all marked with that number.

(Government's Exhibit 201 for identification received in evidence.)

(369)

Mr. Wright: We are now offering 202.

Mr. Leisure: In this case too, if the Court please, the heading may be misleading to the Court. It says "Theatre Pooling Agreements between the Producer-Exhibitor Defendants" and so forth. This agreement with Skouras is not between any of the other defendants at all, and the heading as it reads there is very misleading.

Mr. Wright: The heading includes their theatre-operating affiliates, and we believe other proof will show that Skouras and Randforce are operating affiliates of RKO through a minority interest.

(Government's Exhibit 202 for identification received in evidence.)

Mr. Wright: We offer 203, which is in two parts.

(Government's Exhibit 203 for identification received in evidence.)

Mr. Wright: And 204 is also in two parts and is offered.

(Government's Exhibit 204 for identification received in evidence.)

Mr. Wright: 205 is offered.

(Government's Exhibit 205 for identification received in evidence.)

Mr. Wright: 206 is offered.

(370)

(Government's Exhibit 206 for identification received in evidence.)

Mr. Wright: Then we offer 207.

(Government's Exhibit 207 for identification received in evidence.)

Mr. Wright: Then we offer 208.

(Government's Exhibit 208 for identification received in evidence.)

Mr. Raftery: Are you putting in 208?

Mr. Wright: Yes, it just went in.

(371)

Mr. Raftery: I want to call this to the Court's attention and ask Mr. Wright for a concession, that the United Artists Theatre Circuit is in no way connected with the defendant United Artists Corporation, nor have we any interest in it, nor has it any interest in us. The only thing in common is the same name, United Artists.

Mr. Wright: That is correct.

Judge Goddard: Has United Artists Theatres Circuit, Inc. any relation to other defendants?

Mr. Wright: Yes, there is a relation to the defendant Fox through Joseph Schenck and also to the other defendants, that is, through stock ownership, and also to other defendants through so-called pooling agreements, which will later appear.

Mr. Caskey: If your Honor please, Mr. Joseph Schenck, as I understand it, from 1935 until fairly recently was a stockholder in Twentieth Century-Fox, having a considerable block of stock but nowhere approaching any substantial interest, and he also, I am informed, has some stock in this corporation called United Artists Theatre Circuit, Inc., but that is the only conceivable affiliation, and I submit that

meets no legal test, and I am sure Mr. Wright will not contend that the defendant Twentieth Century-Fox exercises any control, participates in the management or has anything whatsoever to do with this corporation.

(372)

Mr. Wright: Our contention will be that Mr. Schenck is an important part of the Fox management and is also president of this Theatre Circuit in addition to the stock interests involved, and, as I have said before, there will be other proof which connects this Circuit with the other defendants in the form of pooling agreements between them.

Mr. Davis: Between all the other defendants?

Judge Hand: That is admitted.

Mr. Wright: Loew, for one. I am not sure how many others.

Mr. Davis: Wait for the proof!

Mr. Wright: The next is 209, which is in two parts.

(Government's Exhibit 209 for identification received in evidence.)

Mr. Wright: These next numbers have not yet been supplied to us. 210, has Loew a copy of that, or Paramount? Loew-Lucas-Jenkins agreement.

Mr. Seymour: As to 210, in response to your request, we have no copy of it. Paramount has no interest whatever in its operation, and I think it must be included in your list by inadvertence. Paramount has an interest in Lucas and Jenkins in other connections. It has none whatsoever in this Rhodes Theatre. It is a wholly independent operation of Lucas and Jenkins. We have no copy of it and I think it is immaterial and irrelevant in the case.

(373)

Mr. Wright: Has Loew a copy of it?

Mr. Thompson: We cannot find any such agreement. The facts of the situation are that a wholly-owned subsidiary of Loew's owns 50 per cent of the stock of the corporation called Rhodes Theatre Operating Corporation. The other 50 per

cent of that stock is owned by three individuals, not owned by any corporation.

Mr. Wright: Who are the individuals?

Mr. Thompson: I don't think I have the names of those individuals, but the record shows that the lease of the Rhodes Theatre was assigned to that corporation. There is no operating agreement for that theatre. It is just operated by this corporation in which Rhodes owns 50 per cent.

Mr. Wright: I understand that; I simply wanted to identify the partners who own the other 50 per cent. I understood that to be the Lucas-Jenkins interests. Perhaps I am mistaken.

Mr. Seymour: I am told that is not the fact.

Mr. Wright: If it is not the fact we should have whatever the facts are, I suppose.

Mr. Thompson: I don't have the names of the other stockholders here. If we have that information, I shall be glad to furnish it.

Mr. Wright: Mr. Marcus calls my attention to the fact that he is under the impression that your interrogatory answer (374)

shows that the theatre is operated for you and the other 50 per cent holder by Lucas and Jenkins, is that correct?

Mr. Thompson: Not by Lucas and Jenkins. I understand that some Lucas and Jenkins organization operates the theatre, but as to—

Mr. Wright: We will withdraw the number here, and if they can simply furnish us with a statement as to who the other interest is, why, that is agreeable to us.

Mr. Davis: Why don't you, Mr. Wright, if I might suggest, you have in Loew's answer to interrogatory 58, let us turn to that? It is in evidence. Let us see what it says.

Judge Hand: What do you propose to do?

Mr. Wright: As I say, I withdraw the number there and I suppose whatever facts appear in the interrogatory answer appear, and Mr. Thompson's statement is satisfactory, provided it will be supplemented with a statement as to who the

owners of the other 50 per cent interest in the company that operates the Rhodes Theatre are.

Judge Hand: All right, 210 is withdrawn.

Mr. Wright: Have you 211, Mr. Davis?

Mr. Seymour: May I see that, Mr. Wright?

Mr. Wright: Yes. We will offer this agreement, 211.

Mr. Davis: If the Court please, with reference to this proposed Exhibit 211, agreement between Loew and Skouras Theatres Company, I wish to point out that, as I am in- (375)

formed, Skouras Theatres Company is not a defendant here, nor an affiliate of any of the defendants. It seems to be a third person pure and simple.

Mr. Wright: We will show the facts as to Skouras Theatres Corporation. It is true it is not a defendant. It is a company which operates theatres which is partly owned by RKO, partly by executives of the Fox Film Company. And those facts will appear in the course of the evidence.

Judge Hand: Admitted.

(Government's Exhibit 211 for identification received in evidence.)

Mr. Wright: Going back to item 210, I notice that in the answer to the interrogatory that is in evidence here of Loew's, that is, Exhibit No. 48, that the page dealing with the Rhodes Theatre, there is the statement made as to Loew's interest: "Nature and extent of interest? 50 per cent leasehold. Name of corporation through which interest is held? Rhodes Theatre Operating Company." And then at the bottom is a notation, Operated by Lucas and Jenkins. Now, am I to understand that is incorrect?

Mr. Thompson: It is not operated by Lucas and Jenkins as a corporation, but I understand the officers of this operating company are connected with Lucas and Jenkins and they do the operating of this Rhodes Theatre.

Judge Bright: What interrogatory was that in answer (376)
to?

Mr. Wright: It is in Exhibit 48. The answer to interrogatory 40, I believe, giving the theatres that Loew had in Atlanta and the nature of the interest.

Loew, I believe, was to produce the numbers marked 212, 213, 214 and 215.

I will offer 212.

(Government's Exhibit 212 for identification received in evidence.)

Mr. Wright: And then, I believe, you have 213 and 214, Mr. Thompson?

We are now offering 213 and 214.

(Government's Exhibits 213 and 214 for identification received in evidence.)

Mr. Wright: And you have 215, Mr. Thompson, or do you have that, Mr. Seymour, Loew's Paramount?

Mr. Seymour: I am told that there is no agreement such as is described under your 215. There is no agreement between Loew and Paramount.

Mr. Wright: There is a lease of the theatre from Loew.

Mr. Seymour: Not from Loew to Paramount.

Mr. Wright: From Loew to Balaban & Katz.

Mr. Seymour: No.

Mr. Thompson: There is a lease of a theatre in Oak Park, (377)

a subsidiary of Loew's, to Essaness Theatres Corporation. That is the operator of the circuit of theatres in Chicago. That lease was assigned to another corporation and is operated by that corporation. There has never been a lease to Balaban & Katz, nor any agreement with Balaban & Katz, or with Paramount, about that theatre.

Mr. Wright: What is the name of the last corporation to whom the lease was assigned?

Mr. Thompson: Oak Park Amusement Corporation.

Mr. Wright: That is the corporation, is it not, in which Paramount is interested?

Mr. Thompson: I know of no Paramount interest.

Mr. Seymour: That is certainly misdescribed.

Mr. Wright: In any event, there is no agreement answering the description and we will withdraw that item.

Judge Bright: Which one is that?

Mr. Wright: 215.

Judge Hand: Withdrawn, 215.

Mr. Wright: Then the Warner-Loew leases that are marked 216 and 217.

Mr. Proskauer: Mr. Wright, I cannot hear a word. I am sorry to keep repeating that. Are you offering 216 and 217?

Mr. Wright: Yes. Those, I believe, you or Loew were (378) going to furnish.

Mr. Proskauer: We have already furnished them. We have given them to you.

While counsel is locating those leases, your Honors, I suppose they may be fairly admissible because they are a transaction between two co-defendants, but they are nothing like a pooling agreement. It is just two leases by which they really exchanged two theatres in Wilmington, Delaware.

Judge Hand: Have you them here?

Mr. Wright: Apparently we cannot locate ours. If either of you gentlemen have your copy here, will you let me have it?

Mr. Thompson: We have 217.

Mr. Wright: May we have that? You haven't 216?

Mr. Thompson: I have not.

Mr. Proskauer: I shall be perfectly glad to look up and see if we can find another copy, but I wish the record to distinctly show that we did furnish it.

Mr. Wright: If you say you did, I assume you did.

(Government's Exhibit 217 for identification received in evidence.)

Judge Hand: Have you marked 216?

(379)

Mr. Wright: They have not located a copy yet.

The next is 218, a Paramount-Warner agreement. Does Paramount or Warner have that?

I have sent upstairs for 218. We apparently have that. I will now have 219 marked, which consists of two parts.

Mr. Davis: What happened to 218?

Mr. Wright: We sent upstairs for it.

(Government's Exhibit 219 for identification received in evidence.)

Mr. Wright: 229 is another Loew-Warner agreement.

Mr. Proskauer: Have you it, Mr. Wright?

Mr. Wright: If you gave it to us, we should have it.

Mr. Proskauer: I hold in my hand the receipt signed by your associate, Mr. Lasser, for all these documents for which you are now calling on me. If there is any question about it, here is it.

Mr. Wright: Does that include 221 and 222 and 223?

Mr. Proskauer: The answer is yes, it does.

Mr. Wright: and 224 and 225?

Mr. Proskauer: The answer is, yes.

Mr. Wright: Here are 221 and 222. Apparently we haven't been able to locate 220.

(Government's Exhibits 221 and 222 for identification received in evidence.)

(380)

Mr. Proskauer: In order that there may be no question of the accuracy, this receipt recites that the originals were received for photostating and return. And after a lapse of time, the originals were returned to us, but we have not produced them in court because we assume, of course, that you have the photostats.

Mr. Wright: That is a reasonable assumption. That applies to 223, 224, 225, 226—

Mr. Proskauer: The answer is yes.

Mr. Wright: —227, 228, 229 and 230, is that right? I mean, those are all, you say, delivered by you to us?

Mr. Proskauer: The answer to that question is yes.

Mr. Wright: They may be being photostated. We will offer 231.

Mr. Proskauer: What is the present offer, if you please?

Mr. Wright: 231.

Mr. Seymour: You are skipping for the moment, Mr. Wright, 223 to 230?

Mr. Wright: That is right, we are searching for those documents.

(Government's Exhibit 231 for identification received in evidence.)

Mr. Davis: That is the lease from Loew to Fox, under (381)

which Fox operates the Warfield Theatre?

Mr. Wright: That is correct.

Then this Fox-Paramount agreement 232, that we will ask to have marked.

Mr. Seymour: I suppose, your Honors, on this exhibit and on certain others to follow, will take notice of the fact that the agreements in question were made by trustees in bankruptcy of this court while the Paramount was under the jurisdiction of the court here.

(Government's Exhibit 232 for identification received in evidence.)

Mr. Wright: And we will also offer 233.

(Government's Exhibit 233 for identification received in evidence.)

Mr. Wright: As I understand the situation as to 234, we are in error there because the corporation named "Paramount Theatres, Inc." had nothing to do with Paramount, is that correct?

Mr. Caskey: That is correct, and the original leases were exhibited to Mr. Marcus and he agreed with our contention.

Mr. Wright: We withdraw that then. 235 is offered to be marked.

(Government's Exhibit 235 for identification received in evidence.)

(382)

Mr. Wright: And 236.

(Government's Exhibit 236 for identification received in evidence.)

Mr. Wright: As to 237, we were naive enough to assume that because Fox and RKO each owned 50 per cent of the Main Street Theatre in Kansas City that there was probably some written agreement in that connection. However, we are informed that no written agreement was made in connection with the acquisition of those interests, so we will merely offer, in lieu of what is described there, using the same numbers, 237-1 and 237-2, the reports in which Fox reported that it acquired a 50 per cent interest or, rather, National Theatres acquired a 50 per cent interest in the Main Street Theatre on December 23, 1942, and RKO reported the acquisition of a beneficial undivided one-half interest in the fee of the same theatre on January 19, 1943, together with the statement that it was not now being operated. The date of this is February 8, 1943. And there are no present plans for its operation; as I understand it, it is still closed.

Mr. Davis: Report to whom?

Mr. Wright: Reports from the defendants named to the Department of Justice pursuant to the provision of the consent decree—Section 11, I believe.

Mr. Caskey: May I see that?

(383)

Mr. Wright: Certainly.

Mr. Whittlesey: If the Court please, with respect to this matter of an agreement between Fox and RKO with respect

to that theatre, Mr. Wright stated that there was no written agreement entered into. I would like to point out that on August 31 we advised the Department of Justice that there was no agreement of any sort entered into between Fox and RKO with respect to that theatre, not merely no written agreement.

Judge Hand: What is this, 238?

Mr. Wright: 237 is that number. It is in two parts, 237-1 and 237-2.

Judge Hand: You are talking about the second part?

Mr. Wright: 237-1, I believe, is the report from Fox; 237-2 will be the report from Loew, both covering this 50 per cent interest in the Main Street Theatre.

Mr. Caskey: Now, the objection to counsel's language is to the fact. What we acquired and what the exhibit shows we acquired was an undivided one-half interest in the fee simple title.

Mr. Wright: I thought that was what I stated.

Mr. Caskey: If your Honor please, to make the statement that they acquired a 50 per cent interest we think is misleading. The building was owned by a number of heirs, and (384)

we bought from one heir an undivided one-third interest in the fee; from another heir, an undivided one-sixth interest; and at a later time RKO, without our knowledge, bought other interest; so as a result we are tenants in common, and the use of a 50 per cent interest might be misleading.

(Government's Exhibit 237-1 and 237-2 for identification received in evidence.)

Mr. Wright: We next offer 238 and 239 which appear to be in fact bound together as one agreement. Both exhibit numbers appear on it, however.

(Government's Exhibits 238 and 239 for identification received in evidence.)

Mr. Wright: If we may go back to 216, we have located that, and I hand it to the clerk for marking.

(Government's Exhibit 216 for identification received in evidence.)

Mr. Wright: Then I have also located 218, which I will hand to the clerk to mark.

(Government's Exhibit 218 for identification received in evidence.)

Mr. Wright: 219 is in. I offer 220.

(Government's Exhibit 220 for identification received in evidence.)

Mr. Wright: We have located the Exhibits 223 through (385)

230 which were not available before, which I have now handed to the clerk for marking.

(Government's Exhibits 223 through 230 inclusive for identification received in evidence.)

Mr. Proskauer: What are you offering, please?

Mr. Wright: I just handed the clerk the documents which had previously been offered but not located. 223, I believe, through 230. Those were the documents you had delivered to us for photostating.

Mr. Proskauer: I do not want to take the time urging the objection of relevancy, but in several of those cases the other party to the agreement is a complete independent, in every sense of that term.

Mr. Wright: I can only say that that is a matter as to which we differ with Judge Proskauer.

Now, that brings us up to 240, which is contained in an envelope, and I will ask to have that marked in evidence.

(Government's Exhibit 240 for identification received in evidence.)

Mr. Proskauer: In connection with the Exhibit 230, just for the sake of getting it all in one place, may it be noted that that terminated last week and is no longer in existence.

Mr. Caskey: In the same connection, I showed Mr. (386)

Marcus when we came down that the sublease of the theatre in Idaho Falls, which is 236, when it expired a subsidiary of National negotiated a lease directly with the landlord, and is no longer an assignee of any lease from Paramount. The relationship is directly between the landlord and the National subsidiary.

Mr. Wright: 241—

Judge Goddard: How about 240?

Mr. Wright: 240 has been received and marked. We now offer 241.

(Government's Exhibit 241 for identification received in evidence.)

Mr. Wright: I now offer 242.

(Government's Exhibit 242 for identification received in evidence.)

Mr. Wright: We now offer 243.

(Government's Exhibit 243 for identification received in evidence.)

Mr. Wright: We offer 244.

(Government's Exhibit 244 for identification received in evidence.)

Mr. Seymour: If your Honors please, as to the group of exhibits going in now, it seems to me again there is a wholly gratuitous use of the word "representative" in the title. They (387)

are stated to be representative film licensing agreements. Now, the fact of the matter is that the Government for purposes of its own called on the defendants to produce certain

license agreements, which we produced, and having produced them they then undertook to characterize them. Now, the characterization ought to be withdrawn. They are certain documents.

Judge Hand: That is a matter of argument.

Mr. Seymour: I do not want the Government's characterization to be constantly before your Honor when there is no basis for it.

Judge Hand: I know, I know.

Mr. Proskauer: The word "representative" causes us no grief, except that we are always pained by inaccuracy.

Judge Hand: You will probably argue it early and late and get it into our heads finally.

Mr. Proskauer: If I may offer an amendment, we will argue it thoroughly and briefly.

Mr. Wright: We offer Government's Exhibit 245 in evidence.

(Government's Exhibit 245 for identification received in evidence.)

Mr. Wright: We offer 246.

(Government's Exhibit 246 for identification received in evidence.)

Mr. Wright: We offer 247, 248, 249 and 250, which are (388) all contained in this red envelope.

(Government's Exhibits 247, 248, 249 and 250 for identification received in evidence.)

Mr. Wright: The last one that went in, your Honors, was 250. Now we offer 251.

(Government's Exhibit 251 for identification received in evidence.)

Mr. Wright: We offer 252.

(Government's Exhibit 252 for identification received in evidence.)

Mr. Wright: We offer 253.

(Government's Exhibit 253 for identification received in evidence.)

Mr. Wright: And we offer 254, 255, 256 and 257.

(Government's Exhibits 254, 255, 256 and 257 for identification received in evidence.)

Mr. Wright: We offer 258.

(Government's Exhibit 258 for identification received in evidence.)

Mr. Wright: We offer 259.

(Government's Exhibit 259 for identification received in evidence.)

Mr. Wright: 259 is apparently in two parts.

We offer 260, 261, 262 and 263, which are all contained in this folder.

(389)

(Government's Exhibits 260, 261, 262, and 263 for identification received in evidence.)

Mr. Wright: We offer 264, 265, 266 and 267, which are all contained in this envelope.

(Government's Exhibits 264, 265, 266 and 267 for identification received in evidence.)

Mr. Wright: We offer 268, which belongs in that same group, Columbia contracts.

(Government's Exhibit 268 for identification received in evidence.)

Mr. Wright: Then the United Artists agreement, 269, 270, 271, 272, 273 and 274, which are all contained in this one envelope.

Mr. Raftery: Mr. Wright, a point of information. Is this "agreement" or "agreements" in those United Artists? Is there more than one agreement?

Mr. Wright: I will have to look at the exhibit.

Mr. Raftery: Suppose you let me look at them. I have not seen that group of agreements recently.

Mr. Wright: Yes (handing).

(Government's Exhibits 269, 270, 271, 272, 273 and 274 for identification received in evidence.)

Mr. Wright: That brings us to the printed license forms. The Fox forms are 275 and 276 for identification. These are the forms which have been printed in full in Appendix B. (390)

Mr. Proskauer: Mr. Wright, will you tell me why you are offering these?

Mr. Wright: I just explained to the Court that these forms were those that were printed in full in Appendix B.

Mr. Proskauer: These are undoubtedly forms that the defendants used in making contracts with people indiscriminately. But if I may ask, what is the relevancy of it?

Mr. Wright: These forms, I suppose, are the best evidence available of the general method of doing business and the manner in which films are made available.

Mr. Proskauer: But there is a charge here of violation of the Sherman Act. What is it in those forms that you claim?

Mr. Wright: There are a number of similarities, for one thing, which we have pointed out in the schedule in the appendix to B, and there are other provisions which are of very dubious legality in and of themselves. I do not think there is anything to be gained by making an argument on the forms at this time. I think it is perfectly apparent that you cannot consider in any event the legality of what has been done here without knowing what the forms of agreement used in carrying on the business are.

Judge Hand: Are these the same forms as are found in Appendix B?

(391)

Mr. Wright: Precisely.

Mr. Caskey: That is true as to 275. 276 is not an agreement but only someone's rather imperfect summary of one.

Mr. Wright: That is correct, but the somewhat imperfect summary is in Appendix B.

(Governments Exhibits 275 and 276 for identification received in evidence.)

Mr. Wright: I think Loew was to produce the forms referred to there. Have you the Loew forms, 277 and 278?

Mr. Davis: Your Honors, again, I ask whether these forms are introduced—I am speaking now of the Loew forms 277 and 278—are introduced as substantive proof of violation of the Sherman Act; and if so I should like to ask again what the clauses are which, assuming that the Court agreed with the Government, the Government would wish to enjoin the further use of. I think we are entitled to that.

Judge Hand: These things may have a bearing or they may not, we cannot tell. They attempt to show a method of doing business, and they may have some bearing on the case, or they may not. We will admit them.

(Government's Exhibits 277 and 278 for identification received in evidence.)

Mr. Wright: 279 and 280, the Paramount forms, are next offered.

(392)

(Government's Exhibits 279 and 280 for identification received in evidence.)

Mr. Wright: We offer 281.

(Government's Exhibit 281 for identification received in evidence.)

Mr. Wright: Mr. Phillips calls my attention to the fact that in the listing of the Paramount form for the 1943-44

season at page 108 there is a typographical error there. The correct number of the form is not Form A340 A-3 but should be Form 4340 A-3. That is Exhibit 280.

The next number I think is 282, the RKQ 1943-44 form.

(Government's Exhibit 282 for identification received in evidence.)

Mr. Wright: Then we will offer 283 and 284, the Warner forms

(Government's Exhibits 283 and 284 for identification received in evidence.)

Mr. Wright: We offer 285 and 286, the Columbia forms.

(Government's Exhibits 285 and 286 for identification received in evidence.)

Mr. Wright: We offer 287 and 288, the United Artists forms.

(Government's Exhibits 287 and 288 for identification received in evidence.)

(393)

Mr. Wright: Now I will hand the clerk 290. We are looking for 289.

(Government's Exhibit 290 for identification received in evidence.)

Mr. Wright: I am informed that we have now been able to locate a photostat of No. 188, and we have the agent here who made the examination and who can identify the photostat; and, I suppose, inasmuch as the claim has been made as to that agreement that it just was not simply a question of not being able to find it, but that they did not know that any such agreement was in existence—since they made that claim, we had better have the agent identify the exhibit.

Judge Hand: Show it to them.

Mr. Caskey: Show it to us.

Judge Bright: Show it to Fox and Loew.

Mr. Caskey: There is no question but what this is Mr. Michel's signature and that he was a vice-president of the company at the time; and the O. K. of the initials of the secretary of the company. You do not have to call any witness to prove that.

Judge Hand: All right. Admitted.

(Government's Exhibit 188 for identification received in evidence.)

(394)

Mr. Wright: No one has been able to locate 181 yet, I take it, and as we have not—I don't know whether Loew or Warner have. That was one you said you were still searching for this morning.

Judge Hand: Have you got the copy of this?

Mr. Wright: We have not.

Judge Bright: 176 is still open.

Mr. Wright: 176 is still unaccounted for. I thought perhaps the defendants might be able to locate a copy during the recess. We have not yet been able to.

I take it the situation as to those listing licenses is the same as it was when we left it this morning, and we will endeavor to see if we can locate a copy.

Judge Hand: Have you got 289 here?

Mr. Wright: No, we are still making a search for that.

I do not think there is much more we can do on the license agreements at this time until they have been located.

Judge Bright: Isn't it printed in full in the appendix?

Mr. Wright: I believe it is.

Judge Hand: Page 180 of the appendix.

Mr. Wright: I do not know whether Mr. Schimel has had an opportunity to check or have compared that form as it appears in our appendix with the form itself—

(395)

Mr. Schimel: I gave a set of forms to Mr. Marcus at noontime. I will get you another set.

Mr. Wright: All right, we will put it in tomorrow if we can't locate it today.

That brings us, I believe, to the Appeal Board decisions. Now, you will find two recent ones given the numbers 291 and 292, and then the first 106 are contained in five volumes numbered 1 to 5 inclusive, which appears on the first page of the list here, and those volumes I think are in the possession of the clerk, because that material was identified—

Judge Goddard: They are in chambers. They were offered on a motion.

Mr. Wright: Yes, they were identified and offered, those numbers 1 to 5.

Judge Hand: What are you referring to now?

Judge Goddard: Appeal Board decisions.

Judge Hand: You mean 291 and 292?

Mr. Wright: And I am also referring to Exhibits 1 to 5 for identification which are listed on the very first page.

Mr. Seymour: I would like to be heard on that offer, if your Honors please.

Judge Hand: All right.

Mr. Wright: I might say that in this connection I do (395a)

not like to encumber the record with the material that is in printed form that is on file at the Arbitration Association. If it were understood that the decisions may be referred to by either party without physical incorporation in the record, then I do not suppose it is necessary; but we offer them to remove any question as to judicial noticeability.

Mr. Seymour: May I inquire of Mr. Wright through the Court for what purpose they are offered?

(396)

Mr. Wright: They are offered, as I stated in my opening statement, primarily as the best available collected data we have as to what the practices of the five consenting defendants have been since the decree was entered; and it represents the Board's findings in a great variety of factual

situations, involving complaints of various character that arose under the decree.

Judge Hand: And they are all clearances?

Mr. Wright: No, if the Court please, they are not all clearances.

Mr. Proskauer: 90 per cent of them.

Mr. Wright: Some of them refer to what are called some run complaints, refusal to license on any terms, some refer to an attempt to secure a specific run, a Section 10 proceeding. I believe proceedings under Sections 6, 8 and 10 of the decree, or perhaps 9, too, account for all of them.

Mr. Seynfour: Now, if your Honors please, in order to have it perfectly plain as to the basis on which these decisions are received, Mr. Wright gave various reasons for their receipt in his opening, and before Judge Goddard on the motion for temporary injunction he offered these decisions as evidence of violation of law, and we objected to them. We think that they are admissible only for a very limited purpose, and for that purpose we would like to have them admitted; but we would like to make sure they are not (397)

admitted for such a broad purpose that they put burdens upon us which should not properly be put upon us.

First, plainly they are not evidence of violations of law, nor of conspiracy, nor of combination. The Appeals Board was deciding certain questions in an arbitration proceeding under standards laid down in the decree and they were not deciding any questions of violation of law, and so, for that purpose, they are plainly inadmissible.

Second, Mr. Wright rather indicated in his opening that he thought they might constitute findings of fact for this case; in other words, that your Honors could, in lieu of making findings yourselves as to any of these facts, somehow, take the Appeals Board findings. For that purpose we think they are inadmissible too. They were decisions under the decree, on the basis of which they were made and on the basis of which they were litigated. They are not findings in a Sherman Act case and could not be accepted as such.

Those two broad categories are categories in which we think they would be inadmissible.

We think that they are admissible for the limited purpose of showing how the decree worked, so that your Honors may know how effective, and how very effective, this arbitration system, set up by the decree, has been; and for that purpose we will urge your Honors to consider all the decisions and not any selected decision, but that is a very limited purpose. What I say to your Honors is, that if they (398)

be received, they be received for that very limited purpose.

Mr. Raftery: May I ask Mr. Wright a question? Did I understand him correctly? You are only offering the Board of Appeal decision against the five defendants and not against the three?

Mr. Wright: We offer everything we offer against all defendants.

Mr. Raftery: Then I am going to file a formal objection on behalf of United Artists and Universal. We were not parties to the arbitration system. We were not parties to the decree. We never participated in any of these proceedings. We object to their admission against Universal and United Artists.

Mr. Frohlich: On behalf of Columbia Pictures Corporation I make the same motion that Mr. Raftery has just made for the other two independent defendants.

Mr. Davis: The statement by Mr. Wright brings me to my feet because I want to formalize the objection of Loew's, Inc. to the admission of these documents. We object, first, that they are no evidence in this hearing of the facts which are recited by the Appeal Board. Those facts that are material in this case must be proven entirely independently.

We object, in the second place, and here I meet the last statement of Mr. Wright, that they are introduced against all the defendants, we object to the introduction against (399)

Loew's, Inc. of any arbitration proceedings to which it was

not a party. It does not, from our point of view, matter at all what the arbiter or court might have done with any one of our co-defendants, and any decision to which we are not a party we object to on that ground.

We object in the third place, because, and I shade a little with my brother on this question, I am not sure that they are even admissible in order that the Court may inform itself of the manner in which the Appeals Board has gone about its duties. If the Court feels it important at any stage of the case to inquire into the activities of the Appeals Board, they are a source of information, but I do not think they are competent as evidence in this case for any purpose. I should like to make that formal on behalf of Loew's, Inc.

Mr. Proskauer: Your Honors, I would like—

Judge Hand: I think we will exclude this evidence for all purposes.

Mr. Wright: If the Court please, I would like to be heard on that because this is an extremely vital matter. We have here records which were made by these defendants themselves in a tribunal that was set up by this Court for the express purpose of exploring the facts of these complaints and finding what the facts were making a record of them and giving appropriate relief. Now, if these decisions are not evidence of the facts concerning what these (400)

defendants have done since this consent decree was filed, I cannot conceive of anything that would be.

Certainly there could be no more futility or no more futile procedure devised than for us to bring before this court the same complainants who have offered testimony in these proceedings, which have been heard by these agents of the court, and findings made, in proceedings where the defendants were present and had the opportunity to cross-examine, argue, appeal, or what you will. Certainly the system that was set up here cannot have the slightest justification; and we will move to set it aside as of any time that

the Court should hold that the record that it builds is not even available for this Court in determining what ultimate disposition should be made of this lawsuit.

That, I submit, is a ruling that would knock the props right out from under the system set up here. There is no excuse for its functioning at all if it cannot at least make a record which can be used by this Court in determining the ultimate disposition of the suit. There is no possible constitutional authority for it, I would say. There may be serious objections on that ground as it is, but to assume that you can have a system working extrajudicially in this manner, set up by decree, and that the Court under that decree cannot even look at it, is, I submit preposterous.

Mr. Proskauer: May I be heard briefly on this? This is (401)

the first time I ever heard the *in terrorem* argument used for the admission of incompetent evidence.

If Mr. Wright wishes to move with respect to the arbitration system, that is his business. I suggest that it has nothing to do with the question of the admissibility of these decisions.

This decree provides, consent decree, that "nothing in it shall be an admission with respect to the allegations of the petition, nor an admission or adjudication that the doing of any of the acts or things hereinafter enjoined or the failure to do any of the acts or things hereinafter directed to be done would constitute a violation of the statute."

I agree entirely with my brother, Mr. Seymour, that your Honors have a right to look at these documents to determine the working of the decree, but to say that when we go into an arbitration proceeding, as to whether a clearance is reasonable or unreasonable, and the arbitrator awards a clearance of two more or three more days, that that is evidence, competent evidence, of a violation of the Sherman Law, is to defy every rule of evidence.

Judge Hand: What is this provision of the decree?

Mr. Caskey: Page 2 of appendix C.

Mr. Proskauer: In one case the arbitrators refused to receive a decision of the Court on the Sherman Law question because they said they weren't concerned with that, (402)

that they weren't deciding whether a thing violated the Sherman Law; they were deciding the thing the decree told them to decide, which is an entirely different thing.

Mr. Wright: There isn't any question about that.

Judge Hand: To what extent have these arbitration decisions done anything except decide about clearance?

Mr. Wright: They have decided questions of fact raised in proceedings involving not only clearance, but, as I have pointed out, demands for run where the claim is that there has been a violation of Section 6.

Judge Hand: What is that?

Mr. Wright: Section 6 is also printed in here at page 8. It is a provision which says that:

"No distributor defendant shall refuse to license its pictures for exhibition in an exhibitor's theatre on film run (to be designated by the distributor) upon terms and conditions fixed by the distributor which are not calculated to defeat the purpose of this section, if the exhibitor can satisfy reasonable minimum standards of theatre operation and is reputable and responsible, unless the granting of a run on any terms to such exhibitor for such theatre will have the effect of reducing the distributor's total film revenue in the competitive area"—

Judge Hand: That is a long thing. Can't you summarize it? What is the effect of it?

(403)

Mr. Davis: It is the refusal of any and all runs to an applicant.

Mr. Wright: The purpose of the provision is to prevent what had happened in the past, that is, a refusal to serve an exhibitor on any terms, simply to protect his opposition from

competition. It is a form of extreme clearance. Unreasonable clearance may be severe where they won't license him films unless he plays six months after the first run. These situations that are covered by 6 are situations where he would simply refuse to sell pictures on any run at all, no matter how late he wanted to play them.

I don't quite understand your Honors' concern about whether or not they are all clearance or covered other complaints. I submit they would be equally admissible even if they were confined to clearance complaints. There is nothing sacrosanct about the facts developed in the course of clearance complaints. They are still facts which are of importance to this Court in determining what it is going to do with this litigation, even if they arose in the course of arbitrating clearance or any other kind of complaint.

Mr. Proskauer: May I suggest, your Honor, that the fundamental vice in the Government's position here is that it disregards the rule of competency of evidence. They want you to say that because an arbiter may have said in a little case to which I was not a party, or perhaps Mr. Davis's client (404)

was not a party, that there was an unreasonable clearance exacted of a man, and he made certain findings in that, that that is binding on us as evidence of a violation of the Sherman Law. No such question was ever submitted.

Mr. Wright: No such claim is made.

Mr. Proskauer: I beg your pardon?

Mr. Wright: I say, such claim is not made.

Mr. Proskauer: Then they aren't evidence of anything.

Judge Hand: Then what is the claim that is made?

Mr. Wright: The claim for them is that they are evidence of the facts adduced; whether or not those facts constitute a violation of the Sherman Act is, of course, a matter for independent determination by this Court. The arbiters were not applying the criteria of the Act, admittedly; they were applying the criteria established in the decree itself, and, in so far as those facts are concerned, even if those facts they found

were not conclusive, they are, at least, prima facie evidence which, if these defendants chose to do so, it seems the most that they could say would be that they have an opportunity here to rebut such facts as have been found in those proceedings, but, to say, your Honor, that they aren't even prima facie evidence of the facts found is simply to ignore entirely the relation between this Court and this arbitration system and these arbitrators. It would be just as though this Court (405)

were to say that it even could not look at the recommendations of a special matter that it had appointed to hear and determine a case and make recommendations. That is virtually what these defendants are saying here, is that you cannot consider what the Court's own agents have done in determining what these facts were, and I say that it is inconceivable that you could justify the continued existence of this arbitration system at all if you were to exclude its operation from the scrutiny and review of this Court in that manner.

Judge Goddard: Upon what theory would you submit, Mr. Wright, the findings in a case in which a defendant was not a party? How could that bind somebody who was not a party?

Mr. Wright: Obviously, as to those not parties to the proceeding there could be nothing binding in what occurred here except in so far as it might be tied up through a finding of conspiracy as between the defendants, just the situation you have with respect to any other facts that individually concern a defendant, they do not, of course, bind another unless you have a tie-up; but clearly the objection—

Mr. Davis: I just want to allude to the last remark of Mr. Wright's. Unless these are admissible on this trial, not as proof of what the arbitrators did, not as proof of the relief which they afforded, but as proof of what the parties (406)

did, as recited by the arbitrator, then he says, unless they are admissible for that purpose, he is going to make the

bold step of moving to dispense with the entire arbitration system.

I do not understand that the arbitral system was set up for the purpose of furnishing evidence on some other trial, whether on the part of the Government or anybody else. I understand the arbitral system was set up to give relief between contending parties, and, indeed, it is so informal in character that under Section 6 of the rules providing for the procedure at hearings, it is recited that "The arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary." The arbitrator's preface reads, "The facts seem to me to be so and so."

But never before have I heard it soberly suggested that such a finding in another proceeding, where those facts might or might not be proper subject of inquiry, that such a finding could be introduced as substantive evidence.

Judge Hand: Well now, suppose his finding is against your client and your client has consented to arbitration, what about it then, and the Appeals Board has, we will say, affirmed or modified or done anything with the arbitration?

Mr. Davis: As between myself, my client and the complainant, that finding of the arbitral tribunal, by our mutual (407)

consent, is binding upon us, but that in another suit between my client and the Government of the United States, or whom-ever, the recitals made by the arbiter can take the place of proof of fact, is to me a proposition so astounding that it is difficult, really, to answer it.

Mr. Proskauer: May I suggest, your Honors, that the very analogy which Mr. Wright uses in his argument points the distinction? He said that this would be just as though your Honors ruled out the report of a special master. On the contrary, if you appoint a special master, it would be in the action in which the trial was being had. He would be hearing the issues on that trial, he would be bound by

the rules of evidence, and he would make a report to your Honors. Here we have, not an arbitration between us and the Government of the United States, we have an arbitration between us and an individual complainant. The arbitrators are enjoined not to respect the usual rules of evidence; they are to take into consideration all business considerations; with certain exceptions; they are not concerned in any decree with the question of law violation. I am talking now about those to which I was a party, because I do not think there is any real distinction. If these arbitrators in the course of a proceeding, to which we might send some young man to take care of, an arbitration between us and John Smith out in some little town, as to whether a two-day clearance or a (408)

ten-day clearance was reasonable, write some finding of fact as between us and that man, surely the mere fact that this arbitration proceeding flowed from a judgment in United States v. Paramount, does not make the Government a party to that proceeding, or doesn't make that finding evidence on the trial of the main issue in this case. And to point that, I pose this question to your Honors: Suppose we offered those arbitration proceedings in evidence as an estoppel against the Government, as to such findings as were made in our favor? Why, there isn't a man within the sound of my voice who wouldn't say that is preposterous, and I respectfully suggest it is just as preposterous for the Government to urge these arbitrators' reports as a judicial finding against us, as having the sanctity of the judgment of a court so it could be offered in evidence.

Mr. Wright: Let me go back just a minute to how this decree came about and how the system was set up. Here we were, settling this case in November, 1940, on an admittedly impermanent basis. We were setting up this procedure for a trial period with the express understanding that when we got through with that period it might be necessary to go ahead and try the case anyhow.

In making this agreement, we set up a system whereby these complaints could be litigated without exposing these

defendants to the liability of contempt proceedings in the (409)

first instance. We knew that the provisions of the decree, which we were attempting to enforce here, were going to be given nationwide application.

What it would have meant, if we had not set up that arbitration system, would have been to devise some system of reference to a master or otherwise for the purpose of hearing the numerous complaints that were going to be brought.

We agreed that we would set it up on a basis where those complaints could be heard in an arbitration forum and there would be no contempt except for a violation of an arbitrator's award.

That system was set up, with the express approval of the Court, the American Arbitration Association designated to perform the function of furnishing the panels of arbitrators and conducting the hearings in the first place, and an appeal board was also especially appointed by this Court for the purpose of granting such review as the parties thought necessary. There again, as a means of relieving this Court from a review function of that character, that job was delegated to these agents especially appointed for that purpose.

Judge Hand: They were final. We had no control over it.

Mr. Wright: They were made final, that is correct, without further review here, with this limitation, that the arbitration system, as such, was not made final and it was expressly understood by everybody who agreed to that decree that the matter would be up for review at the end of the three-year period. We don't— (410)

Mr. Davis: I challenge that.

Mr. Wright: Just a minute. We do not agree with the defendants' contention at all that they are now entitled to continue this arbitration system indefinitely, as a matter of right. It has only been continued since the expiration of the

three-year period, according to our position, by the failure of either party to move to set it aside. Any time that either party moves, under the decree, as we read it, the Court would have no discretion but to set it aside.

Judge Hand: Do you think they could introduce the decisions of this Appeal Board and bind the Government?

Mr. Wright: Well, clearly—

Judge Hand: Wait a minute. As to the facts in the case?

Mr. Wright: Clearly, prima facie, yes. Those facts are established in the course of a mechanism to which we were parties in the sense that we consented to have the thing done that way, even though we weren't parties to the individual proceedings. Clearly, that is the whole difference in the point of view in this arbitration system. The defendants seem to regard it as something that was simply set up as a (411)

matter of their convenience to operate wholly outside the judicial framework as a means of disposing of some troublesome complaints that they had.

The only justification the thing has is as a law enforcement device. That is all this suit covers. That is the only jurisdiction this Court has. And the only jurisdiction that the whole system itself derived is from this Court's function, as the agency engaged in making effective the Sherman Act.

They just cannot have their cake in that respect and eat it too. They did get a very wide immunity from contempt proceedings for these continuing violations of these practices that were prohibited in the decree, and we were willing to give them that as the price of convenient administration, but certainly we never supposed that we were not going to have available, for the purpose of the tribunal which created the system, such evidence as it develops as to what was occurring during this trial period.

Judge Bright: You are not precluded from the evidence; you are precluded from adjudications upon the evidence, if this objection is sustained. They are adjudications made between other parties, not between you and a party, but be-

tween a complaining theatre operator and one of these defendants. Suppose it had been private litigation between the same two defendants, would you be able to introduce (412)

the case on appeal in that private litigation in this case as proof of the facts in that case?

Mr. Wright: That, I think, is an entirely different question, I would say. Probably not. But this is not private litigation. This is public litigation. This is part of a system of public law enforcement. The United States may not have been a party to these proceedings in that it did not go in and actively represent these exhibitors, although I think we did intervene in some proceedings, but the whole theory on which the system was set up was that it was a means of law enforcement, and that the exhibitors by litigating these complaints in these forums would achieve the purposes of the Act.

Those proceedings are an integral part of this one right here. You cannot separate them out and look at it as though these were just proceedings comparable to the triple damage suits to which the United States was not a party. We are a party to this suit, party to this system, and we have to be. There is just no way it could be properly set up and function except in the framework of this suit.

Mr. Leisure: If the Court please, I do not think we need to rely on it—I agree thoroughly with my distinguished associates, Judge Proskauer and Mr. Davis, that there can be no possible reason for offering this evidence in another action, and I agree with Judge Bright, it is just as if it were (413)

offered in another private litigation—but from time to time here we are held responsible for something that was done by some predecessor in corporate office, and I am afraid that my brother Wright finds himself in that same position here, because the Government did agree in this decree to certain things, and one of those things was that the evidence should not be used subsequently. Let me just read to you from the

first paragraph in the decree, which has already been mentioned:

"Neither such consent, nor this decree itself, nor the entry of this decree, nor any statement, provision or requirement contained in this decree"—

Now, clearly, the arbitration provision was one of the requirements in the decree—

"shall be used as evidence subsequently."

So Mr. Wright, if we did not have a body of evidentiary law to rely on would find himself out of court on this particular issue.

Mr. Wright: I participated in the negotiations of this decree myself and I have never heard such a distortion of plain language. What that refers to clearly is the fact that when we provided in this Section 6 that they should not license, or not refuse to license, a run on some terms, that that provision was not to be construed as an adjudication that they had unlawfully refused it or unlawfully engaged in that (414)

practice in the past, and the same thing, of course, applies to all the other prohibitions that were contained in the decree. Those prohibitions which provided arbitration procedure were not in themselves were to be taken as an admission that they had engaged in the practices which were prohibited. There isn't any question at all about that, but it is perfectly clear that nothing in that first paragraph or anywhere else in that decree ever suggested that this Court would not be able to examine what has been done in the course of carrying out this decree, in determining what ultimate disposition of the suit should be made.

Mr. Leisure. We have no objection to that, but when the issues are totally different, and the issue is one of a violation of the antitrust law as between other parties, certainly there can be no reason for urging it to be offered here in a different forum on a different issue. I have never heard of such a suggestion as that before in court.

Mr. Raftery: Judge Goddard asked Mr. Wright the specific question, how can these proceedings be binding on any party to this action who was not a party in the arbitration proceeding, and Mr. Wright answered your Honor, and I think, if I remember correctly, he stated he did not believe they could be binding. I therefore, on behalf of Universal and United Artists, defendants, enlarge my previous objection to cover that ground, and also, the evidence he seeks to (415)

offer against us is hearsay, and I ask for a specific ruling as to these two defendants.

Mr. Frohlich: Columbia joins in that motion.

Judge Hand: Whatever be the decision as to these other defendants, I should think it was clear as to the independents, and I am perfectly sure we would all sustain your objection. I am not so perfectly sure about the others.

Mr. Seymour: May I just suggest this, that if your Honors consider the matter further, perhaps overnight, my position, which I hope I made clear at the outset, is the same as Mr. Davis's as to the inadmissibility of this material as evidence either of a violation of law or a substitute for facts in this case. My point was that it might be admissible, as to which he disagreed, for the very limited purpose of showing how the decree had worked. That would not permit any of these decisions to be offered as a substitute for calling the complaining witness in this case. That is what the Government is trying to get by, that is what it is trying to do, is to use one of these decisions instead of individuals and shift to the defendant some burden, whether or not they were in the case, some burden as if that case had been this case. As to that we are all in accord that it is not admissible, but it may be, I think, and Mr. Davis does not, it may be admissible for a severely limited purpose, and when your Honors come to consider that, I wish you would consider (416)

whether it could be admitted for a severely limited purpose which would not cast upon us indirectly the burden.

Judge Hand: How many of these decisions are you trying to get in?

Mr. Wright: We relied in our trial brief—I think we quoted from, in our appendix C, a relatively few. Again, the only reason for offering all was, simply that was the complete picture that was made in the course of these proceedings and was material which the Court should have access to. So far as what we would specifically rely on, there would probably be very little of it.

Judge Bright: What do you say, again, they were relevant to prove?

Mr. Wright: I say they are proof, at least prima facie, of the facts which are there found.

Judge Bright: Of the facts testified to by the complainants?

Mr. Wright: Facts of all kinds. Facts, I mean, findings—

Judge Bright: You are chiefly interested in the facts testified to by the complainants?

Mr. Wright: We are interested in those as well as other facts which were produced by the defendants in the form of their testimony, or license agreements or whatever the arbitrator had before him.

(417)

In so far as the facts he found may be relevant here, we say that those decisions are prima facie evidence of those facts. Obviously, they aren't any evidence in themselves that the law has been violated. The arbitrator's consideration of certain facts as being relevant in that proceeding is not necessarily binding on your Honors, and, of course, is not binding at all on your Honors' consideration of what place, if any, those same facts have in this proceeding, but my point is that you cannot in any event shut your eyes to the facts there found in so far as those facts may be relevant to the issues that you are here to determine, and that, of course, includes relief as well as liability.

Mr. Davis: May I say just a word to straighten out what looks like a difference of opinion here at counsel table? My friend, Mr. Seymour, suggests that there are certain aspects in which these might be considered by the Court. I agree. What is that aspect? Not an aspect which is presented before the Court at this time at all. Mr. Wright suggests that the consent decree was limited in life to a three-year trial period. Nothing of the sort. It is as alive, as vital a decree today as it was when it was entered. It is binding, until modified, on the parties to this litigation, both the Government and the consenting defendants, not on our friends in the outer fringe. It provides on its face that the Court retains jurisdiction to modify that decree. If my (418)

brother Wright were here on a motion to modify that decree, by altering or abolishing arbitral clauses, it might be competent and your Honors might be interested in looking at these decisions, not to determine whether the facts they contained were true or false, but whether the arbitrators and the Board of Appeals were discharging their duties in an impartial and in an effective manner. That is all there is in it, but Mr. Wright is not here in that posture at all. He is here asking for relief.

(419)

He is here asking for relief outside the decree, beyond the decree, without reference to the decree, based upon what he believes to be a substantive violation of the Sherman Law by these defendants; and in enforcing the Sherman Law, of course, he is enforcing or seeking to enforce a highly penal statute. Now, I take it that there is no precedent in the trial of a criminal charge under Anglo-Saxon jurisprudence for attempting to prove that somewhere else the accused has committed another crime. The only exception, if I remember my Hornbook Rules of Evidence, as to that rule is that you may prove the commission of another crime where the crime charged requires some special skill, as forgery; and to prove the capacity of the defendant to commit forgery you may be

permitted to introduce other forgeries that he has committed. But certainly it cannot help on this trial in the least to show that at another place, before a non-judicial tribunal, between other parties, a charge was made and certain facts were adduced.

Now, I cannot amplify that. I am tempted to say that much just to show that my brother Whitney and I have not entirely ceased to touch elbows with each other.

Mr. Proskauer: May I suggest one consideration in line with what has been suggested here. We go before an arbitrator—and I had one in which I was a party—and we litigate such question as was litigated in the arbitration I have (420)

before me. "There being sufficient competition to sustain clearance, the question remains as to the length of clearance which will not be unreasonable." And that complainant testified in that case, and I cross-examined him on just one thing, and that is what was within the purview of the arbitration subject to the highly restricted provisions and restricting provisions of the decree. Indeed, I had not cross-examined him at all practically on the other phases of these things which would affect an ultimate finding of fact as bearing on the Sherman Law. Doesn't that bring into the highest relief that the endeavor—and I am raising this now on fundamental considerations of the basic laws of evidence—that the contention that a finding of an arbitrator in a proceeding between me and John Smith on a highly restricted question of clearance cannot possibly be used in a litigation between the United States Government and myself, and that you might just as well say that the Government could go out and put in evidence of a finding of a court of record, if you please, in a case between me and a stranger; and when my friend used the phrase that my colleague on my left had distorted this decree in reading it, I find no suggestion of distortion. I too participated in the drafting of this decree, and nobody ever dreamed that this arbitrating tribunal was

(421)

to do anything more than to settle disputes between contending claimants for clearance and the like. That is what it did, and such findings of fact as it has made were binding in that arbitration proceeding were stipulated not to be binding, as we read this decree, in this case; and on the basic rules of evidence would be wholly incompetent.

Judge Hand: We will consider this question overnight, and you can go on with the next point.

I just want to ask you this, Mr. Wright: These Appeal Board decisions cover 291 to 298, do they not, and 1 to 5, all those volumes?

Mr. Wright: There are five volumes numbered 1 to 5. Then there are two decisions, 291, 292, and we are offering the six awards that are designated there as 293 through 298. Those are not decisions of the Appeal Board. Those are decisions or awards of the arbitrator where no appeal was taken. As we see it, there is no difference in admissibility. The only difference is one of weight. Obviously we would say that the Appeal Board decisions would be given more weight than arbitrators' awards because of the review, but that they are equally admissible.

Mr. Davis: Let me understand. Are these offered to prove that such and such awards were made, or are they offered to prove the facts that the arbitrators recited?

(422)

Mr. Wright: They are offered for both purposes.

Mr. Davis: We object.

Mr. Seymour: One further vice, I should think, in this last group is that they are only a few of 400 arbitration decisions. Now, the Appeal Board decisions are offered in bulk, but here are six selected out of 400, which would give a very distorted view.

Mr. Wright: As far as we are concerned, the defendants can select such as they want to offer, and offer them with the same effect as the ones we selected would have.

Mr. Proskauer: Your Honors, that sounds generous, but we are not making a bargain here; we are objecting to evidence that is incompetent.

Mr. Wright: May I say one thing more about Mr. Davis's last remarks about our operating outside the decree. We cannot try this case without reference to the consent decree and what has gone before. We are not attempting to. In effect any judgment that is rendered here necessarily takes the form of a modification of that decree. There is simply no escape from that fact, and there is no suggestion in anything that we have done or said that we intend to follow any other course.

Mr. Raftery: Mr. Wright, are you offering the arbitration decisions against these defendants (indicating).

Mr. Wright: I repeat for the purposes of the record, the (423)

offer is made generally as against all; and, its ultimate weight, of course, whether or not it is given effect against—

Judge Hand: Well, we will exclude them against your defendants.

Mr. Schwartz: That includes mine also?

Judge Hand: Yes, the independent defendants.

Mr. Wright: If the Court please, I think your Honor accepted Mr. Frohlich's characterization of his defendants a little too quickly. We object to the term. Those people are not called independents in the trade, and I think they are major companies. I just wanted to be sure.

Judge Bright: You called them the three minors.

Mr. Wright: I just wanted to be sure that we did not have an independent adjudication.

Mr. Raftery: I thought the record showed we were now called minors.

Mr. Wright: I take it the ruling is also reserved on these, 293 through 298?

Judge Hand: Yes.

Judge Goddard: When you speak about an arbitration award, do those include any facts, or merely findings?

Mr. Wright: They are in the form usually of an opinion with findings. It simply states what the arbitrator found and what he did. That is what the award consists of.

(424)

Judge Hand: Now, we have got through 300.

Mr. Wright: Through 298, I believe.

Judge Hand: Oh yes.

Mr. Wright: Now, 299 is a document that is offered merely because it throws additional light on the Supreme Court decision. Ordinarily you would have the decision in that case below in the district court reported. In this case the district court decision is unreported because there was no opinion filed. All the court did below was to file findings and conclusions.

Judge Hand: Well, did it go up to the Supreme Court?

Mr. Wright: Yes.

Judge Hand: Well, you may put that in.

Mr. Proskauer: Your Honors, one moment, if you please. We have no objection to the Court looking at anything on the theory of stare decisis to enlighten itself, but he is offering in evidence—and I do not think your Honors apprehend this—findings of fact and conclusions of law.

Judge Hand: I do not think he is. We shall not consider it for anything except for such bearing as it has on the Supreme Court decision.

Mr. Proskauer: Then it is not evidence.

Judge Hand: Not really. But what harm does it do to make it an exhibit?

(425)

Mr. Seymour: The difficulty with it is, my client, Paramount, was a party to that suit, and was dismissed by the Government.

Mr. Proskauer: So were we.

Mr. Seymour: And so was Judge Proskauer's, and so were some of these others. Now, the findings are offered as if they were binding—

Mr. Wright: I submit that it can be stipulated that the Court may take judicial notice of these documents. I do not care about offering it, but it is not reported, and the only way I can bring it to your attention is by offering it.

Mr. Proskauer: We will stipulate the Court may take judicial notice of any document of record which throws light as a matter of law on any reported decision.

Judge Hand: This is not received as competent evidence. It is received as a legal document that may serve to interpret a decision of the Supreme Court.

Mr. Schwartz: May I ask your Honors to ask Mr. Wright if the findings as to Columbia Pictures are included in that?

Mr. Wright: I believe they are.

Mr. Schwartz: You know, we were dismissed.

Mr. Wright: Yes. That appears quite plainly.

(Government's Exhibit 299 for identification received in evidence.)

(426)

Judge Hand: Now, 300.

Mr. Wright: 300 is a document of a different character. This is also unreported material. It is a report of the special master that was rendered in a criminal contempt proceeding brought by the United States against—

Judge Hand: Well, what became of it?

Mr. Seymour: It was never confirmed by the District Court.

Mr. Wright: The suit was settled as a part of the settlement of this litigation in 1940 while the case—

Judge Hand: We won't receive any such thing as that. That is absurd.

Mr. Wright: Well, if the Court please—

Judge Hand: Oh no.

Mr. Wright:—I think it is relevant data. If you will let me finish, that decree in which that proceeding occurred is tied to this one in that it was also modified as a part of this same settlement of this suit here and of the contempt proceeding. This decree, the Balaban and Katz decree—

Judge Hand: We are not going to receive any report of a special master that was not confirmed, even if we could receive it had it been confirmed. Objection sustained. Now go on.

Mr. Wright: The other documents are decrees which were (427)

entered against one or more of the defendants in other jurisdictions, and there were original decrees, and then there were modifications entered in each case at the time that this decree was entered.

Mr. Davis: What is that evidence of?

Mr. Caskey: Objected to.

Mr. Raftery: If your Honors please, isn't there some provision in the Sherman Act that you cannot admit consent decrees in other proceedings?

Judge Goddard: They are not evidence in treble damage cases.

Mr. Davis: I ask again, what are these decrees evidence of here?

Mr. Wright: I submit, if the Court please, they are evidence of the scope and effect of the consent decree which is of record in this case. At the time that decree was entered these decrees here were modified on the condition that certain provisions there were suspended while the provisions and this decree remained in effect. I think it is necessary to understand the operation of this decree to have those decrees in evidence.

Mr. Caskey: Mr. Wright, I am sure that you are in error with respect to 301. There may have been a modification of 303 but it is not my understanding that there was any modification of 301, and it is objected to.

(428)

Mr. Wright: As I understand it, 301 is the 1930 consent decree against West Coast Theatres. Then 303, I believe, superseded that, and then that was modified, in turn, by 304. I think all three are necessary to show what happened.

Mr. Caskey: Now, if your Honors please, on this matter of modification: In the consent decree that was entered in the Paramount case there were certain provisions for arbitration of runs, and it was provided that that complainant in those arbitrations might not be one who had an interest in more than six theatres. In order to arbitrate you had to have five or less theatres, and this modification that is talked about simply eliminated that requirement as to arbitration for first and second runs in southern California. That is all that is involved in these other proceedings. Now, there are many other clauses in these decrees that have no relevancy to that point whatsoever.

Mr. Seymour: I should suppose that a consent decree by its own terms was inadmissible as evidence of anything. I have not looked at this particular one, but its ordinary recital is that consent is on condition that it should not be used as evidence in any other proceeding. Now to have it offered as evidence of something is completely defeating that provision. (429)

The decree in Southern California in 1930 does not prove anything about 1945, I submit.

Mr. Davis: The thing I am puzzled about, your Honor, is why in the world this Court, which already has received a fair quantum of documentary evidence, should be invited to take decrees of courts in causes that are not related to this; and presumptively I think counsel would be compelled to examine these decrees and find out, if they can, what that litigation was under which they were entered, and their scope; and for the life of me I do not see how they throw the slightest light on the interpretation of the consent decree in this case. Counsel seems to think that whenever there has been any litigation in which the names of any of the defendants at this table have been mentioned, ipso facto he is entitled to introduce it in evidence. Not cite it to the Court as authority, if you please, but to make it a part of his evidentiary case. I do not understand that.

Mr. Wright: If the Court please, that again we have offered in evidence only because we have referred to them, and we assume that they would not otherwise be judicially noticeable, because they are entered in a court in another jurisdiction. Now, if it is understood, again, that these may be referred to by this Court, we have no desire to have them physically incorporated in the record.

(430)

Judge Hand: All right, they may be referred to. They are not marked in evidence. That is what? 301 to 305?

Mr. Wright: And the same thing applies all the way through, 306 to 311. Those are pleadings—

Mr. Davis: Now wait a minute.

Mr. Proskauer: That is going a little to fast for us, your Honor. I have never heard of anybody offering in evidence a criminal indictment returnable against Warner Bros. in Missouri on January 11, 1935.

Judge Hand: Neither did I. I think it is absurd. You cannot put such stuff in.

Mr. Proskauer: Particularly in view of the fact that the jury returned a verdict of not guilty.

Mr. Wright: That fact was pointed out in our Appendix C in which we made reference to the proceeding. Again, the only reason for including it here is that we had to refer to it, and we did refer to it, and I suppose—

Judge Hand: Why did you have to refer to it?

Mr. Wright: Well, we think it is a legitimate part of the history of the proceedings that have been brought in prior cases which this Court should consider in determining what ought to be done here.

Judge Hand: You mean to say a criminal information that resulted in a verdict for the defendant?

(431)

Mr. Wright: There were a series of three cases. We did not offer that as proof of any violation by them. We simply recite the facts as to what had happened in prior proceedings brought by the United States; and having recited those

facts, inasmuch as there was a question about judicial noticeability of the material, we felt bound to include it in this offer. Now, again, I do not care to have it in the record, providing—

Mr. Davis: Where do you recite the facts, Mr. Wright?

Mr. Wright: We referred to that material in Appendix C.

Judge Hand: They are withdrawn then. 306 to what?

Mr. Wright: 311.

Mr. Proskauer: What is the ruling? Did your Honors rule?

Judge Hand: They are withdrawn. Now, what next?

Mr. Wright: I think that the Federal Trade Commission material should also be withdrawn. Those are reported decisions. There is no problem of judicial notice there involved, 318 through 323.

Judge Hand: Withdrawn?

Mr. Wright: Yes.

Now, as to 312 through 317, that is material, again, which (432)

we referred to in describing the past efforts that had been made by the Government to regulate certain problems in the industry. I do not think it would be judicially noticeable unless brought to the Court's attention in this form.

Mr. Proskauer: Why should the Court's attention be called by way of evidence to a report which Mr. Clarence Darrow made criticizing the Code of the NRA No. 124? What proof is that against us that after the NRA established a code for this industry Mr. Clarence Darrow did not think it was right?

Mr. Davis: What proof is the NRA itself?

Mr. Wright: Both the Board and the NRA did have an official status. I think it is a matter of interest as to what those officials did at that time in connection with the industry problems.

Judge Hand: What about 312?

Mr. Wright: 312 is the NRA Code.

Judge Hand: What about 313?

Mr. Wright: I do not think those amendments are of any significance. We can withdraw 313.

Mr. Davis: I should like to ask for what purpose counsel is offering the NRA Code 312?

Mr. Wright: Again, we have referred to the Code in our appendix describing the history of prior efforts made by the (433)

Government to regulate competitive abuses in the industry. Having referred to it, we felt bound to offer it in this form.

Mr. Proskauer: Counsel's argument is that he referred to something and therefore he has a right to put it in evidence.

Judge Hand: He admits that it is not admissible, as I understand it. He merely wants to refer to it as contemporary economics or legal theory, or whatever you choose to call it, as a basis for making an argument; isn't that it?

Mr. Wright: Quite right, merely material which the Court should take notice of.

Judge Hand: You can do that with anything.

Does that apply to all of these?

Mr. Wright: That applies right straight through 312, 314, 315, 316 and 317. We merely referred to those documents and felt bound to bring them to the Court's attention in this way.

Judge Hand: If you want to furnish some of those things, I should think they would be very limited indeed. To give us some information for a brief, I should think they would be all right.

Mr. Wright: That was the only purpose. We had included references to them in our trial brief, in Appendix C, (434)

and it seemed to us that having done that we were bound to bring them officially to the Court's attention. Now, again, we do not care whether they are incorporated physically as evidence, as long as they are noticeable.

Judge Hand: I would really rather personally have you make these arguments yourself, where you can make some

statement about their background than to have this enormous list of what they said in the Oregon Law Review about it. This kind of business that a good many judges put into their opinions I do not think should be there.

Now, it is past the time for adjournment, and we will pass on this question of the arbitration and the Appeal Board tomorrow morning.

What more have you?

Mr. Wright: Now, as to the FBI reports, I should like to say what has been done and what we are trying to do. As I say, we had the FBI agents make an inspection of these 400-odd towns, I believe, and observe the theatres that were operating there; and then they prepared a report on each town which gives the name of the theatres, the name of the operators, the general age and condition of the theatre, its policy, whether first-run or otherwise; its admission prices, and the number of changes per week.

Now, we are not interested in offering all of that detailed data. After we had done that we submitted it for checking (435)

by the defendants as to each town. Our primarily purpose in having the report made was to get a definite check on the situations where the defendants owned or operated all the theatres, and those situations where they had all of the first-run theatres, and those so-called closed situations where they also were maintaining closed theatres. For our purposes we are perfectly willing to offer a summary of those facts and it will make unnecessary to have the detailed reports introduced. We simply had the agents record at the time they made the report this other information.

Judge Hand: Have they seen all this?

Mr. Wright: Yes. The particular defendant who operates in each town has seen the report which was made on his town. The others have not been exchanged.

Mr. Caskey: Let me say that the information falls into two classes: As to our theatres, the information furnished by the FBI is inaccurate in many substantial respects. We

went to the expense of having prepared ourselves similar information which we have tendered to the Government. If they want to put that in, of course, there will be no objection. If they do not want to put it in we shall object to the FBI reports, as to the information. As to the theatres not operated by us, we have indicated to the Government our objection. (435a)

Substantially speaking, it is wholly inaccurate, and we have so indicated to the representatives of the Government.

Judge Hand: We will have to meet that tomorrow. You had better confer and see what you can agree on to shorten this.

(Adjourned to October 11, 1945, at 10:30 a.m.)

(436)

New York, October 11, 1945,
10.30 o'clock a.m.

Trial resumed.

Judge Hand: You go on with your offers.

Mr. Wright: If the Court please, in connection with the offer of these Appeal Board decisions that were made yesterday, I think—

Mr. Proskauer: Mr. Wright, we cannot hear you,

Mr. Wright: I beg your pardon.

In connection with that offer I want to say that I think that I was largely at fault in the manner in which that was presented to you, by offering all these decisions en masse, when actually we only intend to rely for our purposes on a limited number.

The reason I did that was that I had assumed from what had occurred on the hearing on the preliminary motion last March that there was no question at all between the defendants and ourselves as to the admissibility of the decisions for some purpose. I assumed that the difference between us was purely a question of the weight and significance to be accorded them. But in view of the position that was taken yesterday that they are not admissible for any purpose, (437)

in order to present the issue clearly and sharply, I shall limit our offer to the following numbers, which are those digested in our appendix C.

Judge Hand: Wait a minute.

Mr. Wright: If you will turn to the first page of the list here I will identify those.

Judge Bright: What pages do they start on?

Mr. Wright: If you will turn to page 1 of our list of exhibits I will identify the particular numbers that are contained in each exhibit to which our offer is now limited.

Mr. Proskauer: Your Honor, for the defense, we do not see the limitation of the offer to certain decisions changes the rule of law.

Judge Hand: Of course, that is perfectly true, but we will take care of that in one way or another when the time comes.

Mr. Davis: I also want to say that there has not been the slightest change on my part as to my objection, because in the tender of these before Judge Goddard the same objection was made, pressed, for the same purpose, and was not passed upon. They were simply offered before Judge Goddard for identification.

Judge Hand: Yes. He said it was not passed on.

Mr. Wright: No question.

Judge Hand: Now go on.

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Mr. Wright: The exhibit No. 1 for identification which contains the decisions 1 to 23, our offer is now limited to Nos. 10, 12 and 18 contained in that volume marked for identification as Exhibit 1.

Judge Bright: Are they digested in your Appendix C?

Mr. Wright: They are digested in our Appendix C.

Judge Hand: 10, 12—

Mr. Wright: And 18.

If you want to see how this ties into Appendix C, your Honors will note that on page 61 of the Appendix C we have there listed a table of the Appeal Board decisions there and awards that were digested; and then on page 62 there is a subject matter index, and the digests follow.

Now, as to Exhibit No. 2 for identification, Volume II, our offer is now limited to the decisions numbered 24, 27, 35 and 40 contained in that volume.

And as to Exhibit No. 3 for identification, our offer is limited to decisions Nos. 52, 58, 61, 63, 65, 66, 67, 68, 70, 71, 72 contained in that volume.

Mr. Davis: Will you give it to us again, Mr. Wright? I did not quite follow.

Mr. Wright: 52, 58, 61, 63, 65, 66, 67, 68, 70, 71 and 72.

As to Exhibit No. 4 for identification, our offer is limited to the decisions in that volume numbered 85 and 87.

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As to Exhibit No. 5 for identification, our offer is limited to decision No. 104.

Then, of course, we have also offered the two additional decisions specifically numbered which appear in the list for identification at page 108 as Exhibits 291 and 292 for identification, and the awards which are identified as 293 through 298 inclusive.

Judge Hand: Let us see. What are you reading from now?

Mr. Wright: I am reading from our list of exhibits, page 108.

Mr. Seymour: It seems to me, if your Honors please, that this selective process destroys the only possible basis for relevancy which I suggested yesterday, that is, if you look at the whole body of decisions. Now it is apparent that the selective process is designed, not to show the working of the system, but to show facts in particular cases, and thus points up the objections which have been raised.

Judge Hand: You may show the working of the system by introducing more, if you want to.

What is this at 108 that you said you—

Mr. Wright: I say there are two additional decisions identified there as 291 and 292, which we are also offering.

Judge Hand: In other words, those are subsequent to these volumes?

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Mr. Wright: Quite right. They are numbered in chronological order.

Then we are also offering the awards which are identified there as 293 to 298, all of which are also digested in our Appendix C.

Judge Hand: Well, we have had extreme doubt about this thing, these offers, but the rules of evidence are getting to be very much liberalized, and it is possible at least that under the peculiar circumstances of this case, where this tribunal set up by the court under a stipulation of these

parties, that these awards and decisions, where the defendants had a chance to examine, or offer proof, or cross-examine the complainants in those cases, may be thought to somewhat resemble the case of an auditor's report. Of course they are not like an auditor's report, the analogy is rather remote, and yet they slightly resemble it. And the parties here have consented to this mode of settling certain disputes, and the decisions may have some *prima facie* weight, not as to the violation of the Sherman Act, for the decisions did not purport to determine that; but as to the facts found in these cases. We shall admit this evidence and, of course, it is subject, like anything else, to motions later made to strike out.

Mr. Davis: May I ask whether your Honor's ruling goes so far as to admit against any defendant any one of these (441)

arbitrations to which that particular defendant was not a party?

Judge Hand: Yes.

Mr. Schwartz: If your Honors please—

Judge Hand: These other people would never sign up; they never agreed to this arbitration at all. We have excluded it against them. We are admitting it against the others. Of course there will have to be a proof of conspiracy to have anything decided against A any good against B. We realize that. It is subject to motions to strike out that may hereafter be made, if counsel are so advised.

Mr. Proskauer: Will you permit me to ask whether your ruling goes so far as to admit these as evidence of facts stated to be found in these arbitrators' opinions or decisions?

Judge Hand: *Prima facie*, yes.

Mr. Raftery: Merely to straighten the record, your Honor, when you said "these other people," you mean the non-consenting defendants?

Judge Hand: Yes.

Mr. Wright: If the Court please, before offering any more evidence at all, I would like to take a few minutes to go into

the Government's legal theory of the case which I neglected completely in my opening. I devoted myself solely to the factual presentation. The defendants, however, did not (442)

neglect their legal theories, and the result has been that, I think, the speed and the manner in which the documents have gone in, have deprived us to some extent of the opportunity that would normally occur to explain the significance of that data in some detail as it went in.

I should like at this time to refer to a couple of Supreme Court decisions and what we say they hold, and what our view is as to the law that is applicable to the activities of these defendants in this case, because I think that is essential to an understanding of how this evidence fits in.

I am very much afraid that I have given the Court the impression that we were just dumping material in here without reference to the specific issues, and I would like to correct that ~~mistake insofar~~ as I can in a few minutes of statement.

The fundamental law that we say is applicable to the activities of these defendants is found in, really, two decisions of the United States Supreme Court, both of which are cited in our brief. The first was the case of *Interstate Circuit v. United States*, which is reported at 306 U. S., and the other is *United States v. Crescent Amusement Company*, decided at the last term of court, reported in 323 U. S.

The situation examined in the *Interstate Circuit* case was this: that was a suit brought by the United States under the (443)

Sherman Act against the same defendants, the distributor defendants that are here before you, and the *Interstate Circuit, Inc.*, a distributor circuit in Texas, affiliated with the defendant *Paramount*.

The charge that was made in that suit was that all these defendants had conspired with each other as distributors and with *Interstate* as an exhibitor, to grant to *Interstate Circuit*, in the agreements they made with it, certain discrimina-

tory privileges which deprived Interstate's smaller independent theatre opposition of an opportunity to compete with Interstate in showing their films.

The specific restrictions that were attacked were minimum admission price restrictions and prohibitions against double features; that is, at the beginning, or, at least, the 1935-1936 or 1936-1937 season, the circuit informed each of these distributors that they could not or would not license their films for first-run exhibition at a 40-cent admission price in the first-run houses which Interstate operated in the principal cities of Texas unless the distributors agreed that those same films would not be shown subsequent run in houses which were in opposition to Interstate Theatres, at a price of less than 25 cents, 25 cents admission, evening, adults; and that they would also agree that these features which Interstate exhibited in its first-run houses at 40 cents would not be exhibited subsequently as part of a double (444)

feature program.

Those two restrictions were put into effect in this territory in which Interstate operated theatres, Interstate and its affiliates, one of which was called Texas Consolidated Theatres, where it was a dominant exhibitor, that is, it had all the first-run theatres in most of the large cities of Texas, and it had a number of second-run theatres in those towns, and it had a large number of first-runs in other smaller towns in Texas and New Mexico. The restrictions in question were put into effect in certain of these cities and not in others by all of these defendant distributors. As to another group of cities, they were put into effect only by the distributor Paramount.

That case, in the trial court, was decided in this manner: the trial court found that there was a conspiracy among all these distributors to put into effect these restrictions in the towns where they all did put them into effect; and that the competitive effect of the restrictions was to lift up the admission prices of some of these independent competitors who

had been charging 15 cents and 20 cents, to the 25-cent price that the Interstate's own second and subsequent-run theatres had been charging, so that the price differential that had theretofore existed was taken away from the independents.

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The trial court, as I say, found that there was a conspiracy among the distributors and Interstate which violated the Act, but it found in addition that in the situations where there was no conspiracy among distributors but in which Paramount alone imposed these restrictions, that the agreements by which those restrictions were imposed were also invalid in and of themselves, and enjoined their enforcement.

That case was appealed to the Supreme Court by the defendant Interstate Circuit and the distributor defendants, and the questions raised there were these: first, they contended that there was no evidence of conspiracy to justify the lower court's findings because it was based upon uniform conduct rather than express agreement among them.

Next they raised the question that clearly as to the agreements which Paramount alone made, the District Court's judgment was erroneous because there was no conspiracy between Paramount and another distributor to impose them; and absent such a conspiracy, there could not be any violation of the Sherman Act, because under the Copyright Law a distributor acting singly could impose any kind of restrictions he pleased on the exhibition of his product in competing theatres.

Now there also was a third point that in any event the

(446)

restrictions imposed were not unreasonable, because, in fact, they simply reflected the business judgment of the distributors to the effect that the most profitable way to exploit the territory as a whole was to impose these restrictions, and that the result shown in the form of added revenue justified that judgment, in that the imposition of the restrictions did result in all of the distributors getting more overall film rental out of the territory, and that therefore

there could be nothing unreasonable about imposing restrictions of that character in any event, no matter how it was done.

Now, when it came to the Supreme Court, those points were all urged and all decided adversely to the contentions of the appellants. The court held that there was sufficient evidence of a conspiracy among all the distributors to impose the restrictions; where they did all impose them, and sustained the injunction as to them.

It also sustained the trial court's action as to the agreements which Paramount alone made in the other Texas and New Mexico towns; and in that connection it discussed, of course, the rights that the Copyright Law gives to a distributor as such, and they said that under the Copyright Law the distributor has no unqualified right to impose any restrictions that he pleases in the distribution of his product; that the privileges granted by the Copyright Law are subject (447)

to the restrictions of the Sherman Act, and that where even one distributor makes an agreement with one exhibitor which has the effect of unreasonably restricting the terms on which that exhibitor's competitors can show or exhibit that distributor's films, is a violation of the Sherman Act.

Now as to the third point about the reasonableness of the restriction, the Court simply pointed out that there was a public interest at stake under the Sherman Act in the form of a competitive pricing of pictures in competitive theatres which did not give way before such financial advantages that might adhere to the distributors in adopting a non-competitive method of pricing pictures—that is, bringing these independents up to the admission price level of Interstate Circuit.

That case, I think, was a landmark for this reason, that prior to that time the last Supreme Court case involving these same distributors were those which were contained in cases which came up in 1930. They are both reported in 282 U. S., I believe. They were cases in which the United

States attacked certain uniform practices that all of them were then engaged in. In one case the provisions that were uniformly incorporated in the license contracts that these defendants made generally with exhibitors which compelled them to assume contracts of other exhibitors when they (448)

acquired theatres, were brought into question. In the other case, the so-called uniform compulsory arbitration clause was brought into question. And the proof consisted in each case of showing that these eight were the dominant distributors in the field, and in that case I believe they all expressly agreed to use these uniform provisions and did use them, and the arbitration in those cases I think was carried out by so-called local film boards of trade, evidence as to which was also introduced in those cases.

And the decision in the District Court was a split one. Judge Thacher, I think, sitting, held that in the one case the provisions were reasonable, and dismissed the bill, and in the other sustained the position of the United States. In any event they were both appealed, both coming up together, and in both the Government prevailed; that is, the decision dismissing the bill was reversed, very short opinions being written by Mr. Justice McReynolds, which simply pointed out that uniform action of that character, regardless of the reasonableness of the provisions refute alone, was a violation of the Act.

Now, as I say, prior to the Interstate case, that case had been regarded as establishing the doctrine of uniform action (449)

by express agreement to impose restrictions which, even though they might be reasonable in themselves, would amount to a violation of the Act; and after that case, after the Interstate Circuit case, of course, the defendants, as we shall show, did continue to use similar forms of agreement and uniform action to a large extent, but not by express agreement with each other, and these particular provisions were abandoned. I believe you will note that those for the 1936-

1937 season which are printed in Appendix B, contain an optional arbitration clause, for example.

(450)

Judge Bright: What was the case in 282?

Mr. Wright: There are two cases. One is entitled Paramount-Famous Players Lasky Corporation, et al. against the United States, 282 U. S. 30. The other is—I thought they were both listed—

Judge Bright: Are they both in the same volume?

Mr. Wright: No, they have different captions. Oh yes, the other is United States v. First National Pictures, Inc., et al. 282 U. S., 44. They are both listed in our table of cases at No. 4.

Judge Bright: None of those cases involved this question of divorcement of exhibition?

Mr. Wright: No. The only question that was raised there was uniform practice of incorporating these compulsory provisions in licenses with exhibitors generally.

And I might add that the Interstate Circuit case did not involve the divorcement issue as such. Although it appeared in the record that Interstate Circuit was an affiliate of Paramount no point was made of that in the presentation of the case or the decision of the Court.

Now, that case, as I say, was finally decided in 1939. There were two appeals that were sent back for findings the first time. The final decision is the one we have referred to here. That was after this suit had been filed and before this consent decree was entered. And that case led directly to

(451)

the filing of the Crescent Amusement Company case, which is the other decision that I want to refer to.

In 1939 after the Interstate Circuit case was decided, the Department then proceeded to file three actions against the same distributor defendants and so called independent circuits located in various parts of the country, of which the so-called Crescent Circuit was one, which operated in towns in Kentucky, Tennessee and Alabama. And the charges as originally made in those three cases, as I say, involved not only the circuits but these defendants, and they each alleged

a general conspiracy among the distributors to conspire with each other to grant various discriminatory privileges to the Circuits in question, which suppressed the ability of their independent competitors to operate in competition with them.

Judge Goddard: What is the title of that?

Mr. Wright: United States v. Crescent Amusement Company.

That was the third of those so-called independent circuit cases to be filed, but the first to be tried.

It was tried in 1941 after the consent decree was entered here; and as I believe as someone else has pointed out, pursuant to the consent decree we dismissed from the suit the distributors who had consented to the entry of the 1940 decree in this suit, and the suit went to trial against the (452)

Circuit and the other three distributors, the non-theatre-owning distributors, Columbia, United Artists and Universal.

But I also want to point out that at the same time this dismissal was made of these other distributors, the complaints were amended so that the charge of conspiracy among distributors was completely eliminated, and the suit went to trial on the claim that there had been a conspiracy among the exhibitor defendants to monopolize exhibition in this area, and a series of separate conspiracies among the exhibitor defendants and each of the remaining distributor defendants to unreasonably restrain—

Judge Hand: This is the Crescent case you are talking about?

Mr. Wright: This is the Crescent case I am referring to. (Continuing) —unreasonably restrain the competition of the independents.

Now, in this case, in the Crescent case, we broadened the prayer for the kind of relief which we had sought in the Independent Circuit case. Instead of merely attacking one form of discrimination which we alleged and proved to have resulted from the use of so-called circuit buying power, we

attacked the exercise of the power as such for the purpose of injuring independent competitors.

Judge Bright: What do you mean attacked the power as (453) such?

Mr. Wright: I think the term "circuit buying power" probably needs a word of explanation. That is a shorthand expression for describing the power in licensing films which resides in any aggregation of theatres which includes within it a number of so-called closed situations. For example, Interstate Circuit's monopoly power, as clearly pointed out in the Supreme Court opinion, rested on its possession of first-run monopolies—principally in the possession of first-run monopolies in several large cities in Texas, and, of course, these other extensive theatre operations.

The fundamental theory on which we attacked the exercise of that power in the Crescent case was exactly this, that in dealing with a circuit of theatres, a combination of exhibitors, if you please, which possesses monopoly power, a distributor does not have the right to do exactly as he pleases; that in making agreements with such a circuit he must, under the law, give due regard to the competitive effect that those agreements will have; that is, the effect that agreements he makes with the circuit will have upon the ability or inability of the independent theatres operating in opposition to the circuit to show his films in competition with the circuit theatres.

Now, the form of the use of that power in the Crescent case covered a much wider variety than the Interstate Circuit case. (454)

There the types of discrimination were not limited to such clearance restrictions as were involved in the Interstate Circuit case, but they also invited refusals to deal at all with competitors of the circuit for the purpose of protecting the circuit from independent competition.

They also embraced situations of this kind, where the independent was enjoying a run of the distributor's product

and the run was arbitrarily taken away and placed in a circuit theatre without giving the independent any opportunity to even negotiate with the distributor for a continuation of the run in his theatre.

Now, these precise forms of the discrimination I think are well summarized in the findings and conclusions of the Court below, which are quite elaborate, and which I offered here the other day; but it is sufficient to point out that that suit did cover the whole ambit of discriminations of that character in its proof, and it also, by way of relief, not only sought to enjoin the mere continuance of such practices—the relief gotten in the Interstate Circuit case—but sought at least partial dissolution of these circuits themselves; and the relief granted by the lower court included partial dissolution of the circuit in addition to enjoining the circuit, or the members of the circuit, from continuing to make the discriminatory licenses with the distributors which they had done in the past.

(455).

Now, the form that dissolution took in that case was to order the principal defendant, Crescent Amusement Company, to divest itself of stock interest which it held in other corporations engaged in exhibition also which had been associated with it in buying these films, and which formed the buying combination which was able to induce the distributors to deal or not deal with the independents in opposition; except on terms which would not permit them to compete.

Now, that case also contained considerably broader relief in injunctive form than merely restraining specific practices. It went so far as to enjoin the exhibitors individually from conditioning in their film licenses with these distributors the licensing of films in so-called closed towns upon the execution of licenses in so-called competitive situations. That, of course, is the principal vice of these aggregations of buying power combined into these circuits. The distributor in order to get into the closed towns will generally find that

he has to discriminate against the independents in the situation where there is opposition, and the independent of course, is whipsawed between the distributor's to get the revenue out of the closed towns and his circuit competitor's desire to see that he is reduced to an inferior position. So that he is in a position where his competitive position is resolved entirely without reference to his legal situation at all, what (455-A)

kind of an operation he has in the town vis-a-vis the circuit theatre in the town, but is ultimately determined simply in terms of what the distributor gets out of his circuit as a whole, which, of course, is always many times what would be available from any small operator in a particular town. (456)

Now, that case, as I believe Mr. Frohlich pointed out, resulted in a dismissal as to two of the distributor defendants. The third, United Artists, was found by the District Court to have unlawfully combined with one or two of these exhibitor defendants in specific situations and was, accordingly, enjoined.

When the case went up on appeal, neither United Artists nor the Government appealed from that part of the decision. I might add there was one other phase of the decree which was considered by the Supreme Court and which I would like to call to your attention. In addition to this partial dissolution, the Government had asked the District Court to enter an order which would prevent these exhibitors from any further acquisitions at all unless they first made an affirmative showing to the Court that the effect of such acquisitions would not be to restrain competition unreasonably. The District Court declined to give that relief but merely—

Judge Hand: The Crescent case?

Mr. Wright: This is still the Crescent case, your Honor. The District Court in that case, instead of that provision, merely enjoined the exhibitor defendants from acquiring any theatres by coercive means.

That case was appealed by both the exhibitor defendants (457)

and the United States. Their appeal challenged the whole case with particular emphasis on challenging the propriety of the divestiture relief. Our appeal was, of course, limited to the refusal to grant the relief against further acquisitions in the form that we had sought. Both of those appeals were decided in the Supreme Court in favor of the Government. The divestiture provisions and all the other injunctive provisions of the decree below, which were before the Court, were upheld and the Court also held that the Government was entitled to the kind of provision that it had sought with respect to further theatre acquisitions and ordered that the decree below be modified accordingly to provide that these should be no further acquisitions by these defendants except and in so far as they might first affirmatively demonstrate to the satisfaction of the Court that the effect of such an acquisition would not unreasonably restrain competition.

The principal significance of that case, as we see it here, is that it for one, showed that the Supreme Court appreciated the fact that you cannot effectively deal with combinations of this kind merely by provisions which tell them not to do in the future what they have done in the past. The other significance of the decision, as we see it, is that it again reiterated and gave point to the proposition that one distributor may be a party to a combination in restraint of trade (458)

even though no other distributor is a party to such a combination; that in this case, of course, in many instances the particular discrimination has not been uniformly indulged in by all but was confined to two or three or even one.

And that decision merely carried along the doctrine first announced in the Interstate Circuit case in that connection.

Those cases, I think, are especially significant in dealing here with this question of the liability of these so-called three minors or independents, or little three, or whatever you choose to call them. They do not, as we see it, have any

unqualified right to sell this market, that we have been attempting to describe here in statistical terms, as they find it; that in selling that market, in making restrictions with those who dominate that market as a result of possessing a theatre monopoly position in certain towns, they are, like anyone else, bound to consider the effect of the agreements they make up the other competitors who are in opposition to those with whom they make these agreements containing terms which expressly restrict the opportunities of these other competitors in showing their films.

To get down to a specific case, here is one of the agreements that was not offered yesterday because I believe it (459)

could not be found. It is No. 196 for identification. I will offer it and I would like to call attention to certain provisions.

Mr. Schwartz: Have you a copy of that, Mr. Wright?

Mr. Wright: I think that is the copy you gave us. I don't think we have another one. We will have it photostated.

Mr. Proskauer: Are you offering something?

Mr. Wright: I am offering 196 for identification.

Mr. Raftery: May it please the Court, in fairness to all our positions here, I don't want to interrupt Mr. Wright in the middle of his testimony, but I think, and I submit, that he should finish his argument before he goes back to offering evidence again.

Judge Hand: I think he should too. I hesitated a great deal, really, to let you start in and talk after you had made this long opening. We cannot go on and talk, talk, talk. We get no picture ourselves.

Mr. Wright: I was merely attempting to illustrate the argument with a concrete piece of evidence.

Judge Hand: All right.

Mr. Wright: If the Court doesn't wish to have that done, I don't do it.

Judge Hand: You had better get through your talk and get through with it quickly and go on with your evidence.

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Mr. Proskauer: Does your Honor care to have any comment from the other side on the argument?

Judge Hand: No; I don't think so.

Mr. Proskauer: We will wait to shoot until we see the whites of their eyes.

Mr. Raftery: And our silence will not be construed as agreeing with them?

Judge Hand: I know; we will avoid estoppels.

Mr. Wright: I have no desire to discuss that document if your Honor doesn't wish to hear it. I was challenged the other day to point to certain provisions which we thought were illegal.

Judge Hand: Are you through with your argument?

Mr. Wright: Why, I have nothing more that I want to press upon the Court at this time.

Judge Hand: That is all right. Then go on putting in your evidence. We will receive this 196.

(Government's Exhibit 196 for identification received in evidence.)

Mr. Frohlich: May I see it, if your Honor please?

Judge Hand: Yes.

Mr. Wright: Then we have also located a copy of 198, which I will offer.

Judge Hand: How about 197?

Mr. Wright: 197 I don't think has yet been located.

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Mr. Raftery: May we see 198?

Judge Bright: Is 196 in your Appendix B?

Judge Goddard: Yes, page 102—Government's Exhibits for Identification.

Judge Bright: But, I mean, is it in your appendix? Is that 196 printed out in full in your appendix?

Mr. Wright: I don't think so. All the agreements that we are offering—none of the executed agreements are printed in full in Appendix B. Appendix B is confined to printed

forms of agreement. In Appendix A we abstracted some of the licensing agreements made between the defendants which are listed there, I believe, at pages 37 through 51.

Judge Bright: In what appendix?

Mr. Wright: Of Appendix A. That is, there is a digest, a summary.

Judge Bright: What pages were they?

Mr. Wright: It begins at page 37, the caption there; the first agreement digested appears on 38 and continues through page 50.

Judge Bright: Your Appendix B, which purports to set out license forms of two different periods, 1936-1937 and 1943-1944—

Mr. Wright: That is correct.

Judge Bright: This one apparently is the 1936-1937 season, 196. Is it in this book?

Mr. Wright: Exhibit 196 is an executed agreement for that season for the parties named here. The printed form of license applicable to that agreement is in Appendix B but the agreement itself, of course, contains special provisions which are not incorporated in the printed form, that is, it has typewritten additions. Those are what I was going to call the Court's attention to.

Judge Bright: Appendix B contains just samples, not executed agreements?

Mr. Wright: That is correct.

Mr. Raftery: May it please the Court, may I ask Mr. Wright if Exhibit 198 was part of the record in the Interstate case?

Mr. Wright: I assume that it probably was, yes, that agreement was part of it.

Mr. Raftery: The agreement was? Well, under those conditions, the defendant Universal wishes to object to the introduction here. This is a matter that has already been litigated and is not part of this litigation. There has been

a decision on this contract. Whatever the result is has been judicially determined and is no part of this action.

Judge Hand: What about that?

Mr. Wright: If the Court please, in so far as the facts contained in this agreement appear in the Supreme Court (463)

opinion, there would be no occasion for offering it, but I don't believe that the Supreme Court or the District Court decision undertakes to describe or summarize the agreements involved in sufficiently elaborate terms to give your Honors a comprehensive picture of what this agreement provides. We offer it not only to bring down—of course, the provisions with respect to admission prices are those discussed in the Interstate Circuit case, but we also offer it for the purpose of showing the method that was used of determining film rental, which I believe is not, for example, discussed in that case at all.

Judge Hand: We will admit it.

Mr. Davis: May I ask your Honors? Mr. Wright said something which I did not catch, referring to pages 37 to 59, is it?

Judge Hand: Of what?

Mr. Davis: Of Appendix A. In what connection were those pages referred to?

Mr. Wright: I think I answered a question of Judge Bright's as to whether in that appendix we had abstracted all of the agreements which we were offering and I replied that we had abstracted only samples.

Mr. Davis: There wasn't any intention to offer those abstracts in lieu of the agreements themselves, I take it? (464)

Mr. Wright: No.

Mr. Schwartz: May it please the Court, on this Exhibit 196, which Mr. Wright offered on behalf of Columbia Pictures, in which he indicated that that apparently came from our files, I am advised it does not bear our markings. I would like the opportunity, after we compared it with whatever

records we have, should it develop not to be an office copy or require some change, to be permitted to do so.

Mr. Wright: Surely.

Judge Hand: Oh, yes.

(Government's Exhibit 198 received in evidence.)

Mr. Wright: We also offer the Universal license form for the 1936-1937 season, which is Exhibit 289 for identification, which was not located yesterday.

(Government's Exhibit 289 for identification received in evidence.)

Judge Bright: You will have one exhibit on page 102, No. 197.

Mr. Wright: That is still missing. Neither Columbia, Paramount nor ourselves have yet been able to locate it.

If the Court please, with reference to these tabulations that are described on page 114 of our list of exhibits and numbered 337—

Mr. Proskauer: Please let us hear you, won't you? Because I want to hear what you say about those.

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Mr. Wright: I am sorry.

I want to call your Honors' attention to the tabulations which have been marked for identification as 337, 338, 339 and 340, and tell your Honors what those are.

Judge Hand: Are you offering these now?

Mr. Wright: Yes, but with an explanation that I would like to make.

Judge Hand: All right. What about these prior ones?

Mr. Proskauer: Are you making an offer? We cannot know what you are doing, Mr. Wright.

Mr. Wright: Yes, I am.

As to the prior exhibits, there is another problem which I will get to in a moment. I would like to first discuss the situation as to these four.

Mr. Seymour: May I see that, Mr. Wright?

Mr. Wright: Yes, you may.

Judge Hand: What is this, 337, 338, 339 and 340?

Mr. Wright: That is correct, your Honor. What those are are mere mathematical tabulations of data which was furnished by the defendant Paramount in answer to interrogatories filed in 1939.

We submitted those tabulations in the form that they are here to the defendant Paramount and we submitted similar tabulations to each of the defendants with respect to their (466)

data in the hope that an agreement would be reached as to the approximate correctness of the mathematics in question.

I have some doubt as to whether it is necessary to actually incorporate data of this kind in the record as an exhibit. I suppose we would be perfectly free to put in brief form, or any other, whatever tabulations we made of data in evidence.

Judge Hand: Don't talk about your doubts. If you want to offer it, offer it.

Mr. Wright: I am.

Judge Bright: Is there an objection?

Mr. Seymour: If your Honors please, as I understand it, after we had checked the figures in a preliminary way, spot-checked them, we advised the Government that a spot-check indicated substantial accuracy, there was a conference of counsel, counsel for one of the defendants and Government counsel, and at that time his attention was called to various errors and inaccuracies in the chart applicable to everyone; in other words, not an error merely applicable to one company, although there were perhaps errors of that kind. In view of the fact that further study of this tabulation indicates that the matters to which the Government's attention was directed at that conference, which occurred in July, I think of this year, I must object to this chart because while

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many of the figures are accurate, the Government has undertaken to include certain theatres as affiliated which are not affiliated, and has undertaken to treat certain runs as preferred, which is just an artificial segregation, apparently, and so I cannot concede that it is accurate in all respects and therefore I object to it.

Judge Hand: These are your own office figures aren't they?

Mr. Seymour: They are made up by the Government from our answers to interrogatories, and it is the tabulation which we object to. Our answers are in.

Judge Hand: You mean that it is the characterizations—

Mr. Seymour: That is right.

Judge Hand: —in the tabulation that you object to rather than to the figures themselves?

Mr. Seymour: Well, it is the—

Judge Hand: Of course we have nothing to do but to admit the figures. If you cannot agree on them and you want to call attention to a mistake, and it is important at all, afterwards, why, that is part of your case.

Mr. Seymour: It is not just a matter of the figures being right and the characterizations being wrong. If it were, I would just point out the characterizations, but the Govern-
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ment has taken figures which we have furnished and then thrown them into categories which we challenge and that obscure the true statistical picture.

Mr. Proskauer: Would your Honors let me call your attention specifically to this—

Judge Hand: Yes.

Mr. Proskauer: —so you will see we are not trying to keep this extra illustrated edition from being submitted here on any technical ground.

I hold in my hand a letter from the Assistant Attorney General, chief of the New York office, Lawrence Apsey, under

date of July 24, enclosing a copy of a memorandum of a conference that we had on this subject.

The charts applicable to us, we advised the Government in that conference, were open to the following objections, and this is the Government's summary of the conference: 1, they use the words "all preferred runs." We challenged that and asked them, in order to make it perfectly clear what they meant, to head it, "First, second and third runs," and then we would agree on that score. In one footnote on one of our exhibits they have done that; in headings they have preserved the other category which, for reasons that will appear here, is entirely misleading.

The second thing that the Government summary of that (469)

conference called attention to was that we called attention to the figures as broken up between affiliated and unaffiliated. We inquired as to which theatres the Government auditor considered in each of these categories. The Government replied it had its own list, and it was not available at the conference. The Government auditor indicated, for example, that in New York City certain named circuits might be included among the affiliated group. We pointed out that unless there was an agreement as to which theatres were affiliated or unaffiliated, there could not be any agreement as to the accuracy of a chart purporting to divide receipts between affiliated and unaffiliated theatres.

The next thing that happened was the Government auditor actually stated to us that in computing revenue from first-runs in New York City that they had included revenue derived from Brooklyn on such pictures as had been exhibited in New York City and Brooklyn on an overlapping day. He did not know whether the same method of computation had been followed in all instances and we observed that this method does not accurately reflect the first-run revenue.

The next thing that happened was this, on one of these charts they illustrate a lot of lump sum deals purported to be covered by interrogatory 48. They cover theatres of a (470)

particular exhibitor located both in New York and outside of New York but with no breakdown of the lump sum as between theatres. The Government auditor credited the entire lump sum to the revenue derived from New York within New York City, and we respectfully observed that the figures on the chart to that extent did not reflect New York City revenues.)

And the last one was Warner's answer to interrogatory 48 designated the first and second and third runs respectively in each city on the basis of the play date instead of on the basis of availability dates, as were presently used in Warner's answer to the Government's additional interrogatories. However this was done, the second and third-run revenue figures, appearing on the chart would not reflect the true revenue from these runs and would therefore form no accurate basis for comparison.

That is the last we heard from the Government. We have spent years of man-time and tens of thousands of dollars of money trying to agree with the Government on these things, yet since July 1945, when they tendered us these charts and we called their attention to specific things like this, they do nothing and come in here and calmly offer the charts. We are going to object to them for that reason, your Honors.

Judge Hand: Of course, this kind of objection, how far (471)

it affects the particular exhibit you propose to offer, I don't know, but this kind of an objection in itself is a sound one. We are perfectly satisfied to take any kind of tabulations you choose from the testimony, but the tabulation must within itself disclose what it refers to and not be filled with characterizations of your own, from which we cannot identify the theatres or the particular facts.

Mr. Wright: There is no question about that whatsoever, your Honor.

Judge Hand: I think this is the kind of thing you ought to have agreed on and got into shape. This just confuses us. We won't know whether it is —

Mr. Wright: I will read what is on these exhibits that I just offered. This exhibit that we prepared was submitted to Paramount and that this is what their counsel had to say about it on July 13, 1949, "A spot"

- Judge Hand: 1945?

Mr. Wright: 1945, it should be. It says "1949." "A spot check of the figures on this sheet has been made by Paramount Pictures, Inc., as a result of which it does not propose to object to the tabulations upon the ground of inaccuracy, but it reserves its right to object to their relevancy and materiality, and Paramount Pictures, Inc. also reserves the (471a)

right to offer tabulations of its own concerning the same subject matter, in accordance with the letter of Simpson, Thacher & Bartlett to Wendell Berge dated June 20, 1945." (472)

Now, I thought that that took care of these particular tabulations. It now appears—and no counsel has suggested this to me heretofore—that he does not wish to stand by the representation that was made at that time.

As far as inaccuracy is concerned, I would say at any time, certainly, if a mistake is discovered, it should be corrected, regardless of whether or not somebody had stipulated before that it was correct. But that really is not his basis of objection now. The mathematical computations are just as correct as they ever were.

Now I agree that insofar as the—

Judge Hand: If you described a thing—I think that was embodied in his objection—if you described a corporation or theatre or anything else as an affiliate, that is merely your description, and we do not know its relation at all, and we not only do not know that but do not know which one it is, why the thing, you see is just all balled up.

Mr. Wright: I quite agree, and I suppose that the only cure for that situation is to submit in each case a statement of—and these should be obtainable from the work sheets, of course—a statement of the theatres which were

classified as affiliated in making up the charts. That is the only way I know how to resolve that controversy.

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Mr. Proskauer: If Mr. Wright would follow the suggestion contained in this correspondence and give us modified sheets or agreements, and make an agreement with us of what he means by affiliated theatres—

Mr. Wright: We do not proposed to tabulate the figures in the way the defendants wish to tabulate them.

Judge Hand: No, there is no reason why you should. I agree with you, Mr. Wright. But there is reason why the exhibit should within its four corners, explain to us what it refers to.

Mr. Wright: As I say, if the Court please, insofar as this chart and all of these charts are concerned, I know of no way to resolve that except to submit to your Honors with the charts a list of those theatres, naming them by name, which were regarded by us as affiliated for the purpose of the chart.

Judge Hand: Have you got such a list?

Mr. Wright: We can prepare them from the work sheets and submit them, and that I think is the thing to do in the event of any question over affiliation here or non-affiliation which, on the basis of the statement here, we do not suppose Paramount intended to raise.

Judge Hand: What about that, Mr. Seymour? What do you suggest?

Mr. Seymour: here are various difficulties which Judge

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Proskauer has outlined. Anything which will enable us to try to agree would be helpful, but the things that Judge Proskauer's associate suggested to Mr. Wright's associates last summer have not been done. They should have been done before this. We will go along with any method of getting these things correct, but the Government has simply stood adamant that its method of doing it is the only way to do it; and we cannot agree that it is correct or permit them

to go in, and give your Honors the impression that they are correct. Now, any procedure by which we can get together on a revision of these things is all right, but that should have been done. It was in July that counsel told Mr. Wright's associates what was wrong with these charts. I am personally a little embarrassed about it because we said in the first instance that the figures, our spot check of the figures, showed them to be correct; and it was only after that or very shortly after that that these errors in the headings came to general attention, but it was immediately after that that counsel for one of the other defendants told Mr. Wright that that same difficulty pervaded all these tabulations, told him it pervaded their tabulation, and it also pervades all the others.

Mr. Wright: In view of what has been said, I see nothing to do except to go over the chart heading by heading to de- (475)

termine what has to be done to resolve the conflict. Now it seems to me on the affiliation question that can be handled by submitting a list of the theatres which we used as affiliated—

Judge Hand: Yes, you could do that.

Mr. Wright: Now, I might as well take them up one by one. The first heading, "Number of National Exhibitions." I take it there is nothing wrong with that?

Mr. Leisure: If the Court please, it seems to me that this would be better: we are not involved in this particular chart, but the ruling made may cover charts we are interested in. Instead of Mr. Wright just drawing a statement from his work sheets and submitting them to the Court, I do not see why we should not follow the orderly Procedure that is followed every day in the courtroom, and take his work sheets and mark them for identification, and then we can tell and the Court can tell what he draws his conclusions and his inferences from. I do not want some statement that he draws from his work sheets submitted to the Court.

Mr. Wright: I might say that at the time we submitted the charts we also made work sheets on which they were

based available in our New York office here for examination, and nobody came down to look at them.

Mr. Leisure: If your Honor please, it is a long time, and (476)

you know something of the difficulty about making things available when the Government has it. When you go there, they are some place else, or some other defendant has them. Why should not they be marked today for identification so they will be equally available to all of us.

Mr. Wright: That is perfectly agreeable to us.

Judge Hand: All right. Go on with your work sheets.

Mr. Proskauer: If the Government will take up the specific objection raised and discuss it with us in an endeavor to avoid burdening the Court with all this terrible detail, I think that would be better. It is our desire to do that as far as we possibly can.

The Court (Judge Hand): You do not seem to be able to agree about things. I should think you ought to be able to agree on some form of statement here, and then make your law points about it.

Mr. Caskey: If your Honor please, one reason we cannot agree is that the issue is one of the ultimate issues to be decided. Now in New York there are three circuits of theatres involved. One is the RKO Circuit, which is clearly affiliated, no question about it. And the revenue derived from RKO should be classified as affiliated. Now the next circuit is the Skouras Circuit, which we say is not affiliated, and which the Government says they will prove is affiliated. And the (477)

third circuit is the Randforce Circuit, which we say is not affiliated and the Government says is affiliated. Now, all we want is, that the chart which shows revenue from affiliated theatres shall show to your Honors how much of it is RKO, which is without the realm of dispute, how much of it is Skouras, which is in the realm of dispute, and how much of it is Randforce, which is in the realm of dispute. Then if your Honors—

Judge Hand: You are clearly entitled to that.

Mr. Caskey: Well, that is what they won't do, and that is what the fight is about.

Mr. Wright: If the Court please, that is not correct that we won't do it. I say I think the only way to resolve that question—

Judge Hand: Maybe it is not correct that you won't do it. It is correct that you have not done it, and here you are going on in this very long trial, and you ought to have ironed this thing out, I think.

Mr. Wright: I submit we did the best we could to do it. Now what he is proposing is to have us recompute the whole chart in the manner he says it should be done. Now I am perfectly willing to submit a list of the theatres which will disclose themselves which have been included in what we call affiliated theatres and which have not. But I submit that (478)

if he wants to compute separately the rental of the theatres which are involved in these various degrees of affiliation, he is perfectly free to do that.

Judge Hand: I really do not see, Mr. Wright, any difference. You could do it by one exhibit or you could do it by four or five, as long as the Exhibit tells on the face of it what it is doing.

Mr. Wright: That is right. I think that is correct.

Judge Hand: Your exhibit could cover the whole crowd, everybody, and maintain, if they are maintainable, your contentions, or maintain, if they are maintainable, their contentions or the contentions of some of them.

Mr. Wright: But I am just pointing out that counsel is apparently now taking the position that he will not agree to the correctness of the figures even if we submit with the chart a list of the theatres which we included in the affiliated rental.

Judge Hand: I do not so understand.

Judge Bright: I thought counsel wanted you to break them down into three subdivisions, as far as RKO is concerned, and put them under your claim of affiliated theatres.

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Mr. Proskauer: What is the objection to your putting in your list of theatres, A, theatres we consider to be affiliated, like RKQ; B, Skouras; and, C, Randforce?

Mr. Wright: There is not any objection to that. That affiliation, of course, appears from other evidence; once you have the name of the theatre, you have the extent of its affiliation.

Judge Hand: Now you are arguing as to whether you have proved your case as to affiliation. That is in question.

Mr. Wright: I assume that it is, but I say the proof as to the extent of the affiliation is nothing about which there is any controversy. The only controversy is as to whether or not these minority interests do amount to affiliations as the defendants use the term.

Judge Hand: Of course.

Mr. Wright: I say—

Judge Hand: The inference, at least, is in question. Why don't you get up an exhibit that discloses the figures on the basis of affiliation and non-affiliation?

Mr. Wright: That is exactly what we did here. Now if we have to further and re-compute—

Judge Hand: No, on the basis of what you claim to be affiliation and on the basis of what they claim to be affiliation.

Mr. Wright: I am perfectly willing to have their figures

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submitted simultaneously on the basis of what they claim to be affiliated, but in order for us to make both tabulations it means that we have to go ahead and redo the charts completely, and figure totals in their categories, which is a very difficult, laborious piece of work.

Mr. Davis: May I suggest, your Honors, that I think we are all overlooking a little bit what the evidentiary status of these charts is. Now, there is a custom, and a very laudable custom, of shortcutting testimony by putting in summaries; and counsel have a perfect right to offer a summary. But

it is not primary evidence at all until it is accepted by the opposing party. We have a perfect right to say we do not accept your summary. Then the burden is obviously upon the person who offers it to introduce the person who made the summary and ascertain in what manner he made his computations, and from what sources. That would entitle us, if we chose to, to insist that these charts were not evidence at all, and the person who prepared them be put on the witness stand and cross-examine as to his sources. That is a laborious process but one to which we are perfectly entitled, and in the absence of it, these charts cannot be thrown at the Court with the airy statement that it is for us, if we see anything wrong about them, to introduce evidence.

Mr. Wright: Now—

Mr. Davis: Just a minute, Mr. Wright.
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Now, that is where we are. Now, we are perfectly willing to have these charts reformed in the particulars which Judge Proskauer says we pointed out in writing as long ago as last July, but we are quite within our rights in objecting to their introduction in their present form.

Mr. Wright: I do not think there is any question about what Mr. Davis says; your Honors. We have Lieutenant Borwick, the man who supervised the preparation of these charts, here, and we shall be glad to have him put on the stand and have him identify what he did with his worksheets, and he is subject to cross-examination. It seems to me, however, that that is a very laborious, needless method of getting at the result.

Judge Hand: I think so, too, but you can't substitute for that laborious method a method which you are using now of putting in stuff that we cannot tell anything about and that the other people dispute.

Mr. Wright: I repeat that I have only offered these agreements on the basis of a stipulation which has been repudiated. Now, that I can't—

Mr. Seymour: Now, I cannot let that statement stand unchallenged. I have explained to your Honors the situation. Mr. Wright says that we are repudiating a stipulation. I do not think we are at all. He was advised last July of these general errors within a period of a few days of the (482)

date of this stipulation; and, furthermore, we reserved in our stipulation the fact that there were inaccuracies here. Now, my objection goes along with that of other defendants to similar charges, and I certainly do not want to be put in a position of repudiating a stipulation or anything of that kind. The Government has known for months what the position of the defendants was.

Judge Hand: Well, we shall undoubtedly sustain the objection as to all these exhibits until they are clarified and the items are segregated. I think you should do it by agreement, without any question. You can agree, not as to conclusions but as to a form which will show what is affiliated and what is not affiliated. If you go over them, it won't require any expert testimony or anything else.

Mr. Wright: Let me suggest this, your Honors. We have Lieutenant Borwick here with his work papers, and I suggest that we can sit down with a chart, with such people they wish to designate, and we can have a conference and prepare a statement, and if we are able, iron it out. And if we can't resolve the question in that way, then I suppose we would be put to the task of putting the witness on the stand and having him testify as to what was done.

Judge Hand: Now, assuming you can do that by cooperation, what more have you got?

Mr. Wright: In addition to the charts which are listed (483)

here, all of which, I suppose, could be handled the same way as these that have just been offered, we obtained a series of letters from persons affiliated with the defendants either as partners or managing officers or employees with respect to certain theatre holdings of theirs, and we have submitted

those letters to all of the counsel, and asked if they would stipulate that these persons, if called, would testify to the facts shown in the letters. The facts in the letters simply show the relationship between these persons and one or more of the defendants, and describes the extent of their theatre interests.

Mr. Davis: Do any of these letters come from Loew's, Mr. Wright?

Mr. Wright: I beg your pardon?

Mr. Davis: Do any of these letters come from Loew's?

Mr. Wright: I am not sure whether we have one from a Loew executive or not. I believe a statement as to theatre holdings, if any, of its executive officers was to be furnished. I do not think we have yet received it.

Mr. Proskauer: Mr. Wright, will you let us look at the letters you want us to stipulate to?

Mr. Wright: May I continue with what I was saying? As I was saying, we submitted the letters to counsel for the defendants, and we would have been advised, I believe, by four of them that they would stipulate that if called as witnesses the writers of the letters would testify to the facts (484)

contained therein, subject to a great many objections that they would want to make on the grounds of relevancy and materiality.

Mr. Proskauer: I am inspecting them, your Honor. I think I am going to be able to say Yes.

Mr. Caskey: What are you offering, Mr. Wright?

Judge Bright: Why don't you make your offer and then we will know whether there is an objection or not?

Mr. Wright: Yes. I shall offer the exhibits marked for identification as 350 through 356, and also 165 through 170.

Mr. Proskauer: That is, 350 to 360 inclusive?

Mr. Wright: No.

Mr. Proskauer: 350 to 356 inclusive?

Mr. Wright: Yes.

Mr. Proskauer: As to these letters, as far as I am concerned, I am advised that we have already stipulated in

writing, and therefore we stipulate here that the signers of these letters, if called, would testify to the facts contained in the letters.

Judge Hand: All right. They are admitted.

Mr. Seymour: I was waiting for Judge Proskauer to finish. As to 168 and 170, I think probably those exhibits ought to be withdrawn. The Government must have been (485)

under a misapprehension as to the relationship of Paramount to the author of those letters. There is no relationship now. I would be perfectly willing to stipulate that if called they would testify as in the letters, but since the testimony would be plainly immaterial because there is no relationship, I think they ought to be withdrawn.

Mr. Wright: I agree.

Mr. Seymour: So 168 and 170 ought to be withdrawn.

Mr. Wright: Yes.

Judge Bright: They are withdrawn, Mr. Wright?

Mr. Wright: Correct, your Honor.

And I will offer just 165 to have it marked.

(Government's Exhibit 165 for identification received in evidence.)

Mr. Wright: 166 is offered.

(Government's Exhibit 166 for identification received in evidence.)

Mr. Wright: And 167 is offered.

(Government's Exhibit 167 for identification received in evidence.)

Mr. Wright: 168 is withdrawn.

Judge Hand: Now, you have 169 and 171, haven't you?

Mr. Wright: 169 is being marked.

Judge Bright: Which one are you introducing?

Mr. Wright: 169.

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(Government's Exhibit 169 for identification received in evidence.)

Mr. Seymour: I would like to see 171.

Mr. Caskey: That is not being offered, is it?

Mr. Wright: 170 is withdrawn.

And I shall offer the others covered by the stipulation which begin at 350, which is on page 115 of the list of exhibits.

(Government's Exhibit 350 for identification received in evidence.)

Mr. Wright: And I will also offer 351.

(Government's Exhibit 351 for identification received in evidence.)

Mr. Wright: 352 is offered.

(Government's Exhibit 352 for identification received in evidence.)

Mr. Wright: 353 is offered.

(Government's Exhibit 353 for identification received in evidence.)

Mr. Wright: 354 is offered.

(Government's Exhibit 354 for identification received in evidence.)

Mr. Wright: And 355 is offered.

(Government's Exhibit 355 for identification received in evidence.)

(487)

Mr. Wright: 356 is a negative letter. I shall withdraw that.

Mr. Caskey: Let me see it, please.

(Letter handed to Mr. Caskey.)

Mr. Wright: I think those are all of those, if your Honor please. I think that accounts for all of the letters of that character that are on the printed list.

Judge Bright: On page 114 there are two there, 341 and 342.

Mr. Wright: Those letters, if the Court please, 341 and 342, those relate to charts again. Those are not of this class, and I think should be taken up with the other chart procedure.

We shall next offer two exhibits which set forth the holding of United Artists Theatre Circuit, Inc. as of March 30, 1940, and March 1, 1945, respectively. The March 30, 1940 list is marked for identification as No. 358, and the 1945 list is marked for identification as No. 164.

Mr. Proskauer: What is being offered?

Mr. Wright: These are statements which were furnished to us by counsel—

Mr. Proskauer: May we see it?

Mr. Wright: (Continuing) —by counsel for United Artists Theatre Circuit, Inc. which sets forth the holdings of the corporation in theatres as of the dates mentioned.

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Mr. Leisure: Is that 164 you are offering, Mr. Wright?

Mr. Wright: 164 and 358.

Mr. Leisure: Now, as to 164, and the other one also, that is a statement made on behalf of a corporation which is not a party to this action and is not charged as a co-conspirator of the defendants in this case. We object to it on those grounds.

Mr. Proskauer: I am advised that United Artists Theatre Circuit, Inc., of course, has no relationship to any defendant in this case, that the name is just a coincidence. We cannot consent to admit these because we do not know a thing about it, and because it indulges in such loose characterization that it is going to result in embarrassment. Here is a heading "Skouras Theatres". What that means,

I don't know. Here is a heading "Randforce Theatres." What that means I don't know. If you get this clarified so as to make clear exactly what it meant we shall seriously consider agreeing on it with you.

Mr. Wright: If the Court please, these exhibits I just offered were also submitted to counsel for the defendants with a request for a stipulation that if the representative of the United Artists Theatre Circuit, Inc. were produced here he would testify to those—

Mr. Proskauer: I don't know what you are saying.
(489)

Mr. Wright: (Continuing) —that he would testify to those facts that are set forth.

Now, these United Artists Theatre Circuit, Inc. theatres and Skouras theatres are those as to which there is a dispute between ourselves and counsel for the defendants as to whether they are or are not affiliated with defendants. All we offer are, of course, the facts showing the extent and character of the affiliation, and the Court may judge for itself how they should be treated.

Mr. Caskey: The facts as testified to by whom?

Mr. Wright: The facts as to—

Mr. Proskauer: Not as to what.

Mr. Wright: (Continuing) —the facts as to the connection between United Artists Theatre Circuit, Inc. and Mr. Joseph Schenck of Twentieth Century-Fox Film, I believe, are set forth in Mr. Schenck's letter which is marked in evidence as Exhibit 166. The facts as to the United Artists Theatre, Inc.'s connection with the defendant RKO, I believe are covered in the interrogatory answers of RKO, from which it appears that they are jointly interested with this circuit in a combination referred to as Metropolitan Playhouses, Inc. The extent to which this United Artists Theatre Circuit, Inc. is engaged in joint operations with the theatre operations with the defendant Loew, I believe, appears in the agreements which have been offered in evidence as No. 214.

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The facts as to joint theatre operations of United Artists Theatre Circuit, Inc. and Fox I believe are contained in exhibit numbers 239 and 238.

The facts as to the association of the Circuit with Paramount I believe are set forth in Exhibit No. 208.

Mr. Caskey: What Mr. Wright has done is to avoid answering the questions as to who is testifying to the facts purported to be stated in Exhibit 164. He has stated that certain things are already in the record. If they are, then nothing is needed. The question is on the competency of this document which, according to my recollection, has never been submitted, although I confess there has been such a welter of material that I am unable to say what has and what has not been submitted to us.

Mr. Wright: The data was submitted to us with a covering letter dated July 27, 1945. This relates to both exhibits which is signed by Mr. William P. Phillips, Jr., who I believe is the vice-president of United Artists Theatre Circuit, Inc., and he is the one that supplied that information in response to our request.

Mr. Proskauer: Let us see that letter.

Mr. Davis: He is not testifying here, is he?

Mr. Wright: When we submitted the data we asked for a stipulation.

Mr. Proskauer: Will you let me see the schedules referred to in this letter?

Mr. Wright: Those are the exhibits for identification we have just been examining.

Mr. Caskey: None of our side of the table have ever seen these before.

Judge Bright: Didn't you say that you had a stipulation that if Mr. Phillips were called he would testify to these things?

Mr. Wright: Apparently we have not. We had submitted these for the purpose of avoiding the necessity of calling a

witness to testify to those facts. Now we are, of course, dependent upon such a stipulation for the competency of the data.

Mr. Proskauer: I want your Honors to understand that this is just as foreign to us as anything can be. We have no connection with this situation; we do not know the people; we do not know Mr. William E. Phillips of the United Artists Theatre Circuit, Inc., and we have never seen these documents.

Mr. Wright: I would concede, your Honors, that obviously the documents are not admissible in the absence of a stipulation that Mr. Phillips, if called, would testify to the facts stated therein.

Judge Hand: They are excluded.

Judge Bright: Why not withdraw the offer, and if you want to renew it later, do so?

(492)

Mr. Wright: I think we shall want to call the witness to establish the facts, and the same thing, I think, applies to an exhibit marked for identification No. 357, which I understood had also been submitted which sets forth the Skouras Theatres Corporation theatre interests as of March, 1939; and I would, of course, only offer this on the assumption that there would be a stipulation that if called, Mr. George Skouras, the president of the corporation who furnished the date, would testify to the facts therein stated, if called as a witness.

Mr. Leisure: May we see the exhibit? We may interpose no objection.

Mr. Wright: The accompanying letter which goes with that is this letter of March 6, 1939, signed by Mr. Skouras (handing).

Mr. Leisure: This was submitted in 1939. What the facts are today, I don't know, but subject to correction we will have no objection to it.

Mr. Wright: I think we got a letter as to the present date.

Judge and: That is 357?

Mr. Wright: That is 357.

Judge Hand: Admitted.

Mr. Wright: I understand, if the Court please, that the
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facts as to the Skouras Theatres holding as of 1945 are contained in the document we offered as Exhibit 164, the statement furnished by United Artists Theatre Circuit which owns an interest in the Skouras Theatres Corporation.

Judge and: I thought that had been withdrawn.

Mr. Wright: That has been withdrawn. I am just explaining that I think we do have that data, and we do propose to offer the 1945 situation.

Mr. Proskauer: If instead of calling it "Skouras Theatres" you would really state who owns them and which Skouras has an interest in them, we would get along very much better. The difficulty here in just calling them affiliated theatres, or Skouras theatres, or some such thing, gives a wrong impression.

Mr. Wright: We did not prepare the chart.

Mr. Proskauer: Neither did we.

Mr. Wright: There is no question that the words "Skouras theatres" refers to "Skouras Theatres, Inc."

(Government's Exhibit 357 for identification received in evidence.)

Mr. Wright: I think, if the Court pleases, that that disposes of virtually everything on the list here except the F.B.I. reports which were given the number 155 for identification.

Judge Goddard: We have the supplementary list.

Mr. Wright: Oh, has that been handed to your Honors? I did not realize you had the supplementary list. If you have that there we may as well dispose of those.

(494)

Mr. Wright: There are on that list additional letters to which I think the same stipulation applies. No. 363 I offer.

Mr. Proskauer: Is this all one?

(Government's Exhibit 363 for identification received in evidence.)

Mr. Wright: And number 364.

Mr. Proskauer: May we see them, what they are?

Mr. Wright: Yes, indeed.

Mr. Proskauer: One request we have to make is to please be advised of what is being offered and to get a look at it.

Mr. Wright: You have a copy of this list, I take it?

Mr. Proskauer: The list does not mean anything. The document does.

Mr. Wright: That is true.

Mr. Proskauer: I cannot find it in my heart to object to any letter signed by Dwight, Harris, Koegle & Caskey.

Mr. Caskey: That is not what it is described as. I call your attention to the fact that the thing being handed to the clerk is not what is described on the piece of paper your associate gave me. If you will look at the letter, it may not be what you want.

Mr. Wright: Let us take a look at it.

(495)

Mr. Proskauer: May I see 363, so we can know what it is?

Mr. Wright: You are quite right, that is incorrectly listed. The letter 364 is from Dwight, Harris, Koegel & Caskey; and the date is correct, but it refers to stock ownership of Joseph H. Moskowitz and not Darryl F. Zanuck.

Judge Hand: Nobody has objected to it so far as I know. Go on with your next offer.

(Government's Exhibit 364 for identification received in evidence.)

Mr. Davis: Have you offered 363?

Mr. Wright: Yes. 365 are additional answers.

Mr. Seymour: May we see those, Mr. Wright? We have never seen them.

Mr. Wright: They have only been received by us within the last day, I believe. They are the remainder of the Universal answers to our 1945 interrogatories 6 to 11. 365 and 366 are Universal answers to our 1945 interrogatories 12 and 13. 367 is a letter of the character covered by a prior stipulation. That is from Gordon, the president of Jefferson Amusement Company, to Paramount.

Mr. Davis: What does he say. What is the letter about?

Mr. Seymour: With respect to Exhibits 365 and 366, if (496)

your Honors please, they are answers of the defendant Universal to some interrogatories which none of us have ever seen before, and that is not a ground for exclusion, but I think it ought to be plainly understood that we should have an adequate opportunity to make corrections.

Mr. Wright: No question of that.

Mr. Seymour: Because they report on theatres alleged to be affiliated with us and we haven't any idea whether they are right or wrong.

Mr. Wright: We will offer 368, which is another—

Judge Bright: Have 366 and 365 been marked?

The Clerk: No, your Honor, not yet.

Mr. Wright: 365.

(Government's Exhibit 365 for identification received in evidence.)

Mr. Wright: 366 is next.

(Government's Exhibit 366 for identification received in evidence.)

Mr. Wright: Then 367 and 368.

(Government's Exhibits 367 and 368 for identification received in evidence.)

Mr. Wright: We will offer 369, which is additional interrogatory data furnished by United Artists.

(Government's Exhibit 369 for identification received in evidence.)

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Mr. Wright: And the same thing applies to 369—1-2-3-4-5.

Mr. Proskauer: What are those?

Mr. Wright: Those are United Artists answers to, or contracts which were furnished to us by way of answer to Interrogatory 6. Instead of answering the interrogatory in the form in which the other defendants answered it, they simply handed us photostats of the contracts in question.

Mr. Davis: You are offering them?

Mr. Wright: We are offering them.

Mr. Davis: Just for the record, your Honors, so there won't be any mistake hereafter, in point of avoirdupois, we concede now that the weight of evidence is with the Government.

Mr. Raftery: And they extracted it from the minor's files. There are \$800 worth of photostats there. The only reason I am pointing it up in that manner is to show the nature and extent of furnishing of contracts in an effort to answer these interrogatories.

(Government's Exhibits 369-1 to 369-5 inclusive for identification received in evidence.)

Mr. Wright: The list that has been handed to your Honors and to counsel again appears to be incorrect. The next item there should bear the number 369-6 instead of 369-5, (498)

and 369-6 is part of the same United Artists material.

(Government's Exhibit 369-6 for identification received in evidence.)

Mr. Wright: And 370, if the Court please, which we are offering, is the up-to-date information as to the Universal's corporate structure, which Mr. Raftery referred to yesterday and which he furnished us.

(Government's Exhibit 370 for identification received in evidence.)

Mr. Raftery: And I presume it is received with the deletions that were made by your Honors as to the other defendants. You will remember you eliminated the number of stockholders and twenty largest stockholders. While this document was being prepared, we were working under the old ruling.

Judge Hand: Yes.

Mr. Raftery: So it is received, I presume, with the deletions.

Judge Hand: That is true.

Mr. Wright: Correct. That, I think, takes care of the list of documents with the exception of the F. B. I. reports, and in accordance with your Honor's suggestion I spent last night checking that data with Mr. Caskey and Mr. Pride as to Fox. We have had others checking the data with the other defend-

(499)
ants who operated in the towns in question and I think that this afternoon we will be able to read into the record the facts upon which we have been able to agree, and those reports can be offered as to which there is no dispute. And that, I think, will virtually complete our presentation, subject to picking up such odds and ends as additional interrogatory data that was to be furnished but in some instances has still not come in.

Mr. Proskauer: Do we have to come back for these F. B. I. reports this afternoon? We have given you, as I understand it, our corrections to a number of things in these reports, all of us.

Mr. Wright: I said that we would put in the data that was agreed upon this afternoon.

Mr. Davis: I am frank to say I never even heard of these F. B. I. reports, and I haven't seen any of them, and I want to know just what they are and how they are made up and what they deal with.

Mr. Wright: I will be glad to explain. These reports are simply one for a town. They originally covered, I think, about five hundred odd towns in which the defendants operate theatres, almost all of which are under 25,000 in

population. A sample form has the heading at the top, the name of the town, what State; then under the theatre column (500)

are listed the names of the theatres in town, under the names of owners, whoever owns or operates; date of acquisition; date built; seating capacity; class of feature; class of films displayed; and general location; the run, whether first or subsequent; evening adult admission price; and the extent of operation; that is, either full time or otherwise; the number of program changes.

As to this data, as I say, we assembled it primarily for the purpose of showing in which towns that the defendants operated in there were no independent theatres, and, second, for showing the towns in which there were no independent first-runs, even though there were independent theatres, and, third, the data as to theatres kept closed by the defendants in the closed towns. That is the data that we are principally interested in.

For our purpose, a summary may be furnished listing that data, and I think will shorten the amount of material in the record. We collected the other information I submitted because we thought, as long as they were going into the towns, they might as well do the complete job and have anything the defendants might wish as well as what we might wish to offer, but I don't want to encumber the record with the entire reports, if we can simply read in or furnish a list which will take care of the points that I just (501)

mentioned.

Mr. Davis: You are not asking us to stipulate the accuracy of the facts on each one of these reports. Here is the sort of thing. One has just been handed me: Town, West Reading; State, Pennsylvania; Fabian Theatres (bought out Wilmer-Vincent, Inc. in June 1944) and Loew's; date acquired, 1939; date built, 1939; number of seats, 754. Class of theatre, 1st. Class of films, A-B once or twice weekly as second film of double feature—once a

week normally; location, 603 Penn Avenue, West Reading, Pa. Serves high-class area; evening adult price, 29 cents plus 6 cents tax (raised in late 1944 from 25 cents plus 3 cents tax); extent of operation, 365 days per year; no other theatre in West Reading; Pennsylvania; theatres closed or converted to commercial use, S. W. Reiff (deceased); when closed or converted, 1912 or 1913. Building no longer standing."

Now, what has that accumulation of data indicated here to do with this case?

Mr. Wright: If the Court please, I have just pointed out that I do not propose to offer that accumulation of data. All that I am interested in showing is those three facts, the situations where the defendant has all of the theatres, the situations where it has all the first-run theatres, and the (502)

names and locations of the theatres that are closed in the closed towns. We collected this other data and submitted it largely for our own purposes, and as far as we are concerned we have no desire to reach any stipulation at this time as to all these details that are contained in the reports. We do want to offer the data I have just referred to in summary form.

Mr. Davis: The highly illuminating fact which I gather from this painful assemblage is that West Reading, Pennsylvania, has only one theatre and that Loew's has an interest in it. I am not able to perceive what it has to illuminate the issues which are supposed to be tried here, and for my part I am not going to assent to these F.B.I. reports.

Mr. Wright: If the Court please, the only purpose of the offer is to give an accurate description of the actual competitive situation in these towns in terms of whether or not there is opposition and whether or not there is first-run opposition. Those we think are relevant facts in measuring the actual buying power that each of these circuits has and shows what their competitive position is.

Judge Hand: Can't you get into a stipulation about anything about it?

Mr. Wright: We have stipulated.
(503)

Judge Hand: We cannot sit here just to hear talk about your desire to prove things that you say exist and their refusal to let you prove them in that way.

Mr. Wright: We do have stipulations, your Honor, as I understand it, with Fox, Warner and Paramount, which were those principally involved. Mr. Davis's company is involved, I think, in possibly one or two situations covered by the reports, and not of any great significance.

Judge Hand: You can probably prove those aliunde, can't you?

Mr. Wright: I beg your pardon?

Judge Hand: You can probably prove those facts, if you want to, aliunde—outside of this F. B. I. report?

Mr. Wright: I think so.

Judge Bright: Prove it by the F. B. I. operator, by oral testimony.

Mr. Wright: That is right.

Mr. Seymour: The point I am going to press this afternoon, when the matter comes up, is the question of the materiality and the relevancy of the proliferation of this case into local areas.

(504)

As your Honors will recall, the Government's brief mentions 73 large cities and they say that there is a monopoly there because some of the defendants have interests in theatres there or operates theatres there, and then they pass to the group of cities, all cities over 25,000 in population, and they say in somewhat around 150 out of the total number of cities there is some kind of monopoly there, that is, monopoly in those cities, and they have a very fancy theory for it, your Honors will recall. What these F. B. I. reports are going to do, and we are agreeing to the facts, in so far as we knew them, so there won't be any dispute about it—now they are going to take this into every hamlet in the United States under 25,000 population, where there is a

theatres situation they want to mention. It I total that number, we have got 73 little lawsuits, perhaps out of the 73 cities; and then we have 150 little lawsuits out of cities over 25,000, and for my part, it seems to me that is almost enough. So, this afternoon, when they come to take up little towns in Alabama and things of that kind, I am going to urge your Honors that that total number of lawsuits, 250, or whatever it is, is almost enough for our purposes unless we can find some way to get the Government perfectly clear that we are not going to have to litigate or discuss situations in those individual cities. That is what I pretty much

(505)

fear, by the Court receiving any more detailed evidence of that kind.

Judge Hand: What about that, Mr. Wright?

Mr. Wright: As far as we are concerned, we do not propose to attempt to break the case down into any more than one lawsuit. We do not offer this evidence for the purpose of showing a particular competitive discrimination in any particular one of these situations. We simply think that it is relevant data on what we conceive to be the fundamental issue in this case and that is the power and extent of the control that these defendants exercise over the film market, the domestic film market, and we think it is an essential part of any estimate of that power.

Judge Hand: Why don't you omit this stuff that Mr. Seymour has just referred to, very small stuff? It hasn't much to do with the case?

Mr. Wright: I would agree that we would still have a case without it. I offer it simply, as I say, to complete the description of the extent of the control that these people have over the market.

Judge Hand: I understand there isn't any objection except by Mr. Davis, whose client is only affected in a very few cases, two or three cases—

Mr. Wright: That is right.

(506)

Judge Hand:—to the competency of this proof.

Mr. Seymour: Well, your Honor, I think that will be the situation. We have reached an agreement, as I understand it, last night, through some of Mr. Wright's colleagues and some of ours on the Paramount situation. Until they actually go in, I am not sure that they will represent precisely the agreement, but that method of procedure is entirely agreeable to us, if you want to take it. I won't make an objection on the ground of competency, if it is in accordance with the agreement reached last night. As to relevancy, that is something else.

Mr. Proskauer: There is another thing, I submit, in fairness that Mr. Wright should do. He just told me that his FBI reports show that these defendants owned theatres in about 400 or 300-some-odd of these little towns out of 500. On the 500 that he examined, my comment was, "You must have picked those 500 pretty selectively."

Mr. Wright: My answer was that we did.

Mr. Proskauer: Yes, you did. That is as false a picture of this country as anybody could give, and it is just going to throw on us the burden of showing by record evidence what the situation is really throughout the country and not going through the process of selecting 500 towns out of all the thousands of little towns in the United States and tendering them to the Court as a national picture.
(507)

Mr. Davis: May I just go back to my West Reading, which has been handed to me? And it arouses my intense interest because I would hate to see the worthy citizens of West Reading in the grasp of the cruel monopoly. And the F. B. I. has made its report, "Fabian Theatres (bought out Wilmer & Vincent in June, 1944) and Loew * * * Walter Vincent now chairman of board of Fabian Theatres, which reportedly was negotiating to buy out Loew interest about six months ago." Somebody has just handed me a notation on that, "Not true, that Fabian was negotiating for purchase of Loew interest. This theatre was consistently losing money because of late run. It is a fifth-run theatre, after Reading,

Pennsylvania. Because of unsuccessful operation, theatre was lost to an independent on September 1, 1945."

This theatre was never operated by Loew and it is the only theatre in the barren waste of West Reading, Pennsylvania.

It is true that in 1912 or 1913, one S. W. Reef, who has been gathered to his fathers, had a theatre, which was closed and the building is no longer standing. I don't know whether this monopoly is responsible for that destruction or not.

If Mr. Wright wants to use these F. B. I. reports, so far as my client is concerned, if he will sort out of this (508)

accumulation all those which refer to situations in which Loew's, Inc. is involved, we will look them over and if we agree with the report of the F. B. I., the report which the F. B. I. agent has given, we will put it in. If we do not, we are not going to, unless the Court commands us, to let this go in and put us to counterproof to correct what is reported by the F. B. I. agent.

Mr. Wright: If the Court pleases, I have already pointed out I did not propose to offer that report for any such purpose.

Judge Hand: We will have to adjourn now. We will adjourn to 2.20, and see if you cannot get these things in shape.

(Recess to 2.00 p.m.)

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AFTERNOON SESSION

Mr. Wright: If the Court please, I spent the noon hour arranging these reports in an attempt to reading in the data that we want or regard as relevant without encumbering the record with the reports themselves.

What I have done is to take the Warner situations, for example, which have, I understand, been checked by them,

and eliminate those as to which there was still any doubt or disagreement. And then I propose simply first to read the names of the towns in which, according to the report, there are no theatres other than those in which Warner has a financial interest.

Mr. Proskauer: I have a suggestion to make about this, your Honors, that I have not had finally checked by all my colleagues but which I think ought to appeal to everybody. As far as I am concerned I want to let these reports go in evidence for whatever they may be worth, if Mr. Wright will stipulate that the 500 towns with a population between 5000 and 25,000 which were investigated by the FBI, were chosen by him because of information that one or more of the five defendants owned theatres in those 500 towns; and that as to the other 6200 towns, none of the defendants owns or operates any theatre whatever. That is the fact. Now, if he will put that in we shall facilitate his putting in what he has got on the 500 towns.

(510)

Mr. Wright: I do not think there is any question about that. These were, of course, selected because the defendants owned theatres in those towns.

Judge Hand: All right. Are you satisfied?

Mr. Wright: Yes.

Mr. Seymour: On that same line, because of the concern which I expressed to your Honors this morning of being burdened and having to burden the Court with treatment of these selected towns in any respect in our proof, I wonder if Mr. Wright, along the same line, won't concede what is also undoubtedly the fact,—that the so-called affiliated theatres in the towns to which he refers are the best physically and the best operated theatres in those towns?

Mr. Wright: We will concede nothing of the sort. We do not think it is a fact.

Mr. Seymour: Now, you see what that does, if your Honors please. That means that we have to face the possibility of dealing in our testimony with the several hundred

towns which he is going to mention in this group, because it is his theory that somehow the circumstance that there is an affiliated theatre in those towns and that there are few, if any, competitors in some of them, is somehow relevant to this case.

Now, for my part, Paramount has interests in theatres in 44 states. To deal with that kind of a problem I have got (511)

to call a great many witnesses who can testify to the local situation, and therefore I must press my materiality and relevancy objection to this whole thing. If your Honors should overrule it I will facilitate the going in of the evidence; but to burden your Honors with this additional group of several hundred towns seems to me quite futile. It does not certainly, since it is obvious that there are so many towns where the defendants own or have interest in no theatres—it certainly does not prove a pattern or monopoly in all towns under 25,000.

Mr. Wright: If the Court please, the material is not offered for that purpose. We have shown, of course, by the theatre lists and other data all of the towns in which all of the defendants and their affiliates own theatre interests. Obviously they have no interests in any other towns. All that this data is offered to show is the competitive situation, if any, in the smaller towns as to which we have no other data than the fact that they have theatres there.

Now, Mr. Seymour, neither he nor anyone else is going to have to call any witnesses before this Court to prove anything he wants to prove about the character or quality of those theatres that they own. It is the kind of thing that there obviously cannot be any dispute about, and as far as we are concerned, we think it is relevant and immaterial in (512)

any event. I simply decline to make the stipulation that he suggested because I do not believe what he stated to be the fact is the fact. If he wishes to make that proof as part of his case, he obviously does not need to call any witnesses to do it as far as we are concerned.

Mr. Seymour: If I do not have to call any witnesses, why don't you concede it? I have got to have either witnesses or a concession, it seems to me, if this material is to go in.

Mr. Wright: You will, I think, have to furnish something comparable to the data that we furnished that you would be willing to submit which you claim established that fact that you assert; and if you did, we would certainly agree that no one needed to be called to the stand to testify in accordance with the representations that you desired to make as to theatre quality in those specific situations.

Mr. Seymour: The difficulty, you see, is you can have a concession about quality and quality of operation, but you can't deal with that statistically; and if Mr. Wright thinks that I am going to undertake to fight him with equally dull statistics on this issue, I am certainly not. You cannot put theatre operation into statistics. A simple concession—and I think it is undoubtedly true that after your Honors familiarize yourselves with all the facts in each one of these things (513)

you would come to that conclusion—is the simple way to do it; and if he does not want to make it, that leaves me with this burden, and therefore I press that objection.

Mr. Caskey: Your Honors, when we come to the list that is going to be submitted as to National which we agreed upon, there are two aspects to it which seem to us to make it wholly immaterial. A considerable number of the so-called towns on the list in which it is said that National has the only theatre or the only first-run theatre are, in fact, suburbs of Los Angeles.

They may be political subdivisions and have a separate count in the census; but it is just exactly as if he were establishing that National had the one and only theatre in Spuyten Duyvil, and we think it is wholly immaterial. The second is that in a large number of them, we have the only theatre in town, the town being in many instances 2000, 3000 or 4000 people. I don't suppose there could be any contention that, having the only theatre in a town in which no one else

had ever attempted to open a theatre, is a violation of any law, but they put them all on the same sheet of paper, and we press the objection as to the immateriality of that kind of testimony.

Judge Hand: We will admit it.

Mr. Proskauer: That is on the understanding that Mr. (514)

Wright has stipulated what I understood him to stipulate, namely, that in approximately 6200 towns in this category of population no defendant operates or owns or has any interest in any theatre.

Mr. Wright: The facts as to what towns of that size are not in are apparent from a comparison of the census figures with the answers. I don't know whether it is 6200 or some other number.

Mr. Proskauer: Subject to correction.

Mr. Wright: But it is taken subject to check with such data as is available.

Judge Hand: All right.

Mr. Wright: With respect to Warner I merely wanted to read into the record the names of the towns which have been checked as being towns in which they have the only theatre or theatres.

Mr. Proskauer: I understood you were offering the papers in lieu of taking the time to read it.

Mr. Wright: No, I am not offering the papers. The only data I am offering is the town list.

Mr. Seymour: The what?

Judge Bright: Offering the town what?

Mr. Wright: Just the names of the towns. The theatres that are in the towns appear and are described in the interrogatory answers and the other lists which we have previously (515)

offered. There was no point in duplicating that data here, as I see it.

Mr. Proskauer: May I make this clear, with the Court's permission, that when we matched these reports, we checked

them only with reference to the fact that we had a theatre in the town. We made no check as to whether there was any competing theatre in the town and, in that respect, we want our freedom to show there may have been, if that develops.

Mr. Wright: Yes.

Judge Hand: That's all right.

Mr. Wright: The Warner towns in which, according to those reports as of the checking so far made, indicates that the theatres in which Warner has an interest are the only theatre or theatres operated in the town, are as follows.

Mr. Seymour: Will you state the population as you go along?

Mr. Wright: No, I cannot. I don't have it. I assume that the Court will take judicial notice of the census figures as to any town that is mentioned.

The towns in Connecticut are: Derby and Manchester;
In Maryland, Frederick;

In Massachusetts, Amesbury, Clinton, Newburyport, Waverly, Woburn;

In New Jersey, Beverly, Bordentown, Bridgeton, Clementon, Collin, Collingswood, Cranford, Dover, Milburn, Millville, Moorestown, Mt. Holly, Nutley, Pennsgrove, Pleasantville, Ridgewood, Riverside, South Orange, Swedesboro, Woodbury. That completes New Jersey, I believe.

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In New York those towns are: Batavia, Medina, Wells-ville.

In Pennsylvania, Ambler, Bala-Cynwyd, Brookville, Donora, Dormont, Elkins Park, Etna, Gettysburg, Greensburg, Jenkintown, Lansdawn, Palmyra, Prospect Park, Punxsutawney, Red Lion, Ridgeway, State College, Tarentum, Titusville, Tyrone, Warren, Willow Grove.

In Virginia, Clifton Forge, Lexington.

In West Virginia, Martinsburg.

In Wisconsin, Delavan and Lake Geneva.

In the following towns, according to the reports so far checked, there are independently owned theatres which are operated, however, under an operating agreement with the Warner theatres in the town. Those are what are

colloquially known as the pool situations. This is where all the theatres in town are under the operating agreement:

Bloomfield, New Jersey; Jamestown, New York, and Harrisonburg, Virginia.

I think that completes the Warner offer.

As to Paramount—

Mr. Seymour: I wonder if it would be agreeable to the Court and counsel if, as he calls the name of the town, I give (517)

the population by the 1940 census, subject to correction? I have a list of them.

Mr. Wright: Entirely agreeable.

Judge Hand: This is Paramount?

Mr. Wright: This is Paramount as to those situations which I understand have been checked.

Mr. Seymour: And it is also true, Mr. Wright, that in many of these places, perhaps in all of them, the theatre is owned by a corporation in which Paramount has, in many cases, well under a hundred per cent of the stock.

Mr. Wright: Yes, I believe the precise extent of the stock interests appear in other interrogatory answers.

The Paramount situations in which there are no theatres other than those in which Paramount has a financial interest are, beginning with Alabama, Auburn.

Mr. Seymour: 4652.

Mr. Wright: Chickasaw.

Mr. Seymour: 1530.

Mr. Wright: Jasper.

Mr. Seymour: 6847.

Mr. Wright: Selma.

Mr. Seymour: 19,834.

Mr. Wright: Troy.

Mr. Seymour: 7055.

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Mr. Wright: As to Arkansas, Conway.

Mr. Seymour: 5782.

Mr. Wright: Dardanelle.

Mr. Seymour: 1870.

Mr. Wright: Fayetteville.
 Mr. Seymour: 8212.
 Mr. Wright: Jonesboro.
 Mr. Seymour: 11,729.
 Mr. Wright: McGehee.
 Mr. Seymour: 2663.
 Mr. Wright: Newport.
 Mr. Seymour: 4321.
 Mr. Wright: Smackover.
 Mr. Seymour: 2235.
 Mr. Wright: Springdale.
 Mr. Seymour: 3319.
 Mr. Wright: Stuttgart.
 Mr. Seymour: 4628.
 Mr. Wright: Van Buren.
 Mr. Seymour: 5422.
 Mr. Wright: Connecticut, Norwalk.
 Mr. Seymour: 39,849.
 Mr. Wright: And Florida, Cocoa.
 Mr. Seymour: 3,098.
 Mr. Wright: Clearwater.
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 Mr. Seymour: 10,136.
 Mr. Wright: Deland.
 Mr. Seymour: 7,041.
 Mr. Wright: Eustis.
 Mr. Seymour: 2,930.
 Mr. Wright: Hollywood.
 Mr. Seymour: 6239.
 Mr. Wright: Melbourne.
 Mr. Seymour: 2622.
 Mr. Wright: Mount Dora.
 Mr. Seymour: 1880.
 Mr. Wright: New Smyrna Beach.
 Mr. Seymour: 4402.
 Mr. Wright: Georgia, Buford.
 Mr. Seymour: 4191.

Mr. Wright: Elberton.
 Mr. Seymour: 6188.
 Mr. Wright: Waycross.
 Mr. Seymour: 16,763.
 Mr. Wright: Kentucky, Fulton.
 Mr. Seymour: 3308.
 Mr. Wright: Maine, Bath.
 Mr. Seymour: 10,235.
 Mr. Wright: Ft. Fairfield.
 Mr. Seymour: 2693.

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Mr. Wright: Houlton.
 Mr. Seymour: 7771.
 Mr. Wright: Orono.
 Mr. Seymour: 3702.
 Mr. Wright: Rockland..
 Mr. Seymour: 8889.
 Mr. Wright: And Massachusetts. The first is Allston.

Mr. Seymour: Isn't that a suburb of Boston or a part of Boston?

Mr. Wright: It is listed here as a suburban situation. I assume it is a suburb but apparently a separate census entity.

Mr. Raftery: If the Court may permit a former resident, it is a part of the City of Boston, Allston.

Mr. Wright: If it is included in Boston, we will withdraw it.

Mr. Seymour: You withdraw it, so we do not have to have any conference.

Mr. Wright: I will withdraw it.
 Brighton.

Mr. Seymour: That is also a part of Boston.

Mr. Wright: East Milton.

Mr. Seymour: Are you withdrawing that?

Mr. Wright: Yes.

Mr. Seymour: East Milton is a part of Milton.

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Mr. Wright: I will withdraw that.

Hyde Park.

Mr. Seymour: That is part of Boston. Is that withdrawn?

Mr. Wright: Yes.

As I understand it, what you are saying is that these are not separate entities, recognized by the Census Bureau?

Mr. Seymour: That is my understanding of it, and that is subject to correction.

Mr. Wright: We are withdrawing those subject to correction. The line we used was simply the census classification.

Natick.

Mr. Seymour: 13,851.

Mr. Wright: Needham.

Mr. Seymour: 12,445.

Mr. Wright: Norfolk Downs.

Mr. Seymour: Part of Quincy. Is that withdrawn?

Mr. Wright: That is withdrawn.

North Attleboro.

Mr. Seymour: 10,359.

Mr. Wright: Northampton.

Mr. Seymour: 24,794, and there appears to be one theatre in which Paramount has no interest in that town.

Mr. Wright: Then it should not be in this list. If that (522)

is the fact—

Mr. Seymour: It is also subject to correction, but do you withdraw it?

Mr. Wright: —it should be withdrawn.

Newton.

Mr. Seymour: 69,873.

Mr. Wright: Roslindale.

Mr. Seymour: That is part of Boston and is withdrawn?

Mr. Wright: Withdrawn.

Wollaston.

Mr. Seymour: Part of Quincy, and it is withdrawn?

Mr. Wright: Withdrawn.

Michigan, Birmingham.

Mr. Seymour: 11,196.

Mr. Wright: Minnesota, Fairmont.

Mr. Seymour: 6988.

Mr. Wright: And I have some more in Florida here.
Arcadia.

Mr. Seymour: 4055.

Mr. Wright: Bartow.

Mr. Seymour: 6158.

Mr. Wright: Bradenton.

Mr. Seymour: 7744.

Mr. Wright: Ocala.

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Mr. Seymour: 8976.

Mr. Wright: Palm Beach, or West Palm Beach I believe it is. I think it is called in here Palm Beach and West Palm Beach.

Mr. Seymour: They are covered by the census separately.

Mr. Wright: I take it the theatres in both communities are all affiliated with Paramount, that's right?

Mr. Seymour: That is correct.

Mr. Wright: Well, that statement will cover it.

Mr. Seymour: Are you going to put it in?

Mr. Wright: Yes.

Mr. Seymour: The population of Palm Beach, I suppose taken at the least favorable time, is 3747; West Palm Beach, 33,693.

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Mr. Wright: Plant City.

Mr. Seymour: 7,491.

Mr. Wright: St. Augustine.

Mr. Seymour: 12,090.

Mr. Wright: Sanford.

Mr. Seymour: 10,217.

Mr. Wright: Sarasota.

Mr. Seymour: 11,141.

Mr. Wright: Vero Beach.

Mr. Seymour: I can't give you the population. That is not on the list in here. I will undertake to supply the population at a later date.

Mr. Proskauer: May I suggest that in phrasing the concession before I was guilty of an inadvertence. I said towns between 5,000 and 25,000. It should have been towns of under 25,000 population, because some of them are smaller than 5,000. I assume we can agree on that, with the Court's permission?

Mr. Wright: Yes.

Mr. Seymour: Where are we going now, Mr. Wright?

Mr. Wright: Winter Haven.

Mr. Seymour: 6,199.

Mr. Wright: And Winter Park.

Mr. Seymour: 4,715.

Mr. Wright: Here are more in Minnesota: Moorehead.

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Mr. Seymour: 5,491.

Mr. Wright: St. Cloud.

Mr. Seymour: 24,173.

Mr. Wright: And in New York: Owego.

Mr. Seymour: 5,068.

Mr. Wright: And Waverly.

Mr. Seymour: 5,450.

Mr. Wright: And in Mississippi: Columbus.

Mr. Seymour: 13,645.

Mr. Wright: Tupelo.

Mr. Seymour: 8,212.

Mr. Wright: West Point.

Mr. Seymour: 5,627.

Mr. Wright: And in North Carolina: Canton.

Mr. Seymour: 5,037.

Mr. Wright: Chapel Hill.

Mr. Seymour: 3,654.

Mr. Wright: Goldsboro.

Mr. Seymour: 17,274, and there appears to be another theatre there.

Mr. Wright: In that case it should not be on. In this list there are three theatres all operated by North Carolina Theatres.

Mr. Seymour: Chapel Hill has a theatre in which Paramount has no interest.

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Mr. Wright: That also, according to the report that was submitted, and I understand checked, has all three operated by North Carolina Theatres.

Mr. Seymour: Will you bear with us just a moment? You go ahead with this subject to correction, if you will.

Mr. Wright: Lexington, North Carolina.

Mr. Seymour: 10,550.

Mr. Wright: And Greenville.

Mr. Seymour: 12,674.

Mr. Wright: And Hendersonville.

Mr. Seymour: Hendersonville?

Mr. Wright: Yes.

Mr. Seymour: 5,381.

Mr. Wright: And in North Dakota, Minot.

Mr. Seymour: 16,577.

Mr. Wright: And in Pennsylvania: Bloomsburg.

Mr. Seymour: 9,799.

Mr. Wright: Carlisle.

Mr. Seymour: 13,984.

Mr. Wright: Danville.

Mr. Seymour: 7,122.

Mr. Wright: Dickson City.

Mr. Seymour: 11,548.

Mr. Wright: Dunmore.

Mr. Seymour: 23,086.

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Mr. Wright: Duryea.

Mr. Seymour: 8,275.

Mr. Wright: Forest City.

Mr. Seymour: 4,266.

- Mr. Wright: Hawley.
 Mr. Seymour: 1,778.
 Mr. Wright: Honesdale.
 Mr. Seymour: 5,687.
 Mr. Wright: Jersey Shore.
 Mr. Seymour: 5,432.
 Mr. Wright: Kingston.
 Mr. Seymour: 21,679.
 Mr. Wright: Luzerne.
 Mr. Seymour: 7,082.
 Mr. Wright: Mauch Chunk.
 Mr. Seymour: 3,009.
 Mr. Wright: Northumberland.
 Mr. Seymour: 4,469.
 Mr. Wright: Pittston.
 Mr. Seymour: 17,828.
 Mr. Wright: Pottsville.
 Mr. Seymour: 24,530.
 Mr. Wright: Sayre.
 Mr. Seymour: 7,569.
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 Mr. Wright: Sunbury.
 Mr. Seymour: 15,462.
 Mr. Wright: And Towanda.
 Mr. Seymour: 4,154.
 Mr. Wright: And again in North Carolina: Goldsboro.
 Mr. Seymour: 19,037.
 Mr. Wright: And in South Carolina: Abbeyville.
 Mr. Seymour: 4,930.
 Mr. Wright: Anderson.
 Mr. Seymour: 19,424.
 Mr. Wright: Darlington.
 Mr. Seymour: 6,236.
 Mr. Wright: Greenwood.
 Mr. Seymour: 13,020.
 Mr. Wright: South Dakota: Madison.
 Mr. Seymour: 5,018.

Mr. Wright: Huron.
 Mr. Seymour: 10,843.
 Mr. Wright: Watertown.
 Mr. Seymour: 10,617.
 Mr. Wright: And in Tennessee: Kingsport.
 Mr. Seymour: 14,404.
 Mr. Wright: And in Texas: Anahuac.
 Mr. Seymour: 1,003.
 Mr. Wright: Arlington.
 Mr. Seymour: 4,240.

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Mr. Wright: Corsicana.
 Mr. Seymour: 15,232.
 Mr. Wright: Eagle Lake.
 Mr. Seymour: 2,124.
 Mr. Wright: Eastland.
 Mr. Seymour: 3,849.
 Mr. Wright: Mercedes.
 Mr. Seymour: 7,624.
 Mr. Wright: McAllen.
 Mr. Seymour: 11,877.
 Mr. Wright: Nederland.
 Mr. Seymour: 2,500.
 Mr. Wright: Paris.
 Mr. Seymour: 18,687.
 Mr. Wright: Port Neches.
 Mr. Seymour: 2,487.
 Mr. Wright: And in Vermont: Barre.
 Mr. Seymour: 10,909.
 Mr. Wright: And Rutland.
 Mr. Seymour: 17,082.
 Mr. Wright: And in Virginia: Charlottesville.
 Mr. Seymour: 19,400.
 Mr. Wright: Exmore.
 Mr. Seymour: 932.

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Mr. Wright: Hilton Village.

Mr. Seymour: 1,673.

Mr. Wright: And Phoebus.

Mr. Seymour: 3,503.

Mr. Wright: That covers all those that have been checked.

As to Fox, the following are towns in which it has been agreed that Fox has an interest in all of the theatres in the town.

Mr. Caskey: Why don't you just mark it in evidence? I have got the population figures, and during recess we can just mark the population figures in?

Mr. Wright: I think that is all right.

Mr. Caskey: Will you just look at the first page, Mr. Wright? Santa Barbara has a population of more than 25,000 and should come off the list.

Mr. Wright: That should remain on the list, with that qualification.

Mr. Caskey: No. This is only a list of 25,000 or less.

Mr. Wright: I take it there is no dispute about the fact that in Santa Barbara the only theatres in the town are three Warner and two Fox. Now, if there is a dispute about that fact, we don't offer it; if there is not, we do offer it.

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Mr. Caskey: I am perfectly willing to concede that there are two Fox theatres, to the extent of my knowledge.

Mr. Wright: Do you concede there are three Warner theatres?

Mr. Caskey: Just a minute. The figure is 34,958.

Mr. Wright: You say you have a list with the population figures on it?

Mr. Caskey: Yes.

Mr. Wright: As to Fox, we will simply ask to have marked this list on which Mr. Caskey has noted the population figures for each town, with the exception of a few which are listed as being in the Metropolitan Los Angeles area.

We can mark that as Government's Exhibit 371 for identification.

Mr. Caskey: Mark it in evidence.

Mr. Wright: That is agreeable. It will be received, I take it.

(Marked Government's Exhibit 371.)

Judge Bright: What is it a list of?

Mr. Wright: That is a list of Fox towns which have been checked so far by the defendants and found to be towns in which all of the theatres are those in which Fox has an interest. That is, towns of less than 25,000. The list as it went in excludes Santa Barbara in which that situation prevails, but is a town of over 25,000.

Mr. Caskey: Now, Mr. Wright, will you stipulate in connection with this that in all the other towns in which Fox operates, a list of which has already been marked in evidence, that there are independent competing theatres?

Mr. Wright: We shall not so stipulate. As I understand it, there are a number of situations where our reports have shown that the town was a closed town, where there has not been a satisfactory reconciliation of the discrepancy.

Mr. Caskey: Well, how many are there of those?

Mr. Wright: I do not know how many there are, but there are number.

Mr. Proskauer: We shall endeavor to narrow the area of difference if you will tell us how many you claim.

Mr. Wright: He knows how many we claim. You have the data.

Mr. Caskey: Four or five towns? We have got it right here. How many are there? You count six? I will take your count. I am not asking for a concession; I am asking for a stipulation that in all the other towns in which Fox or National has theatres except those on this Exhibit 371 and six unidentified ones there is competition.

Mr. Wright: We will give you no such stipulation.
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Mr. Caskey: There are other theatres operating.

Mr. Wright: There are other towns in which no survey was made in which I think there is no operating competition. There are towns of more than 25,000 in which there is no independent competition.

Mr. Caskey: We are trying to narrow the ambit of this case, and so far unsuccessfully. Will you make it under 25,000?

Mr. Wright: I repeat that our reports, in so far as I know, I have no assurance that they cover all of the towns under 25,000 in which Fox operated. There certainly can be no dispute about the facts. If you can make available to us the data on those towns, we shall be glad to stipulate it with you as to any town where you operate.

As to RKO and Loew we have received no checked reports, and we think the situations of that character in which they are involved are not sufficiently consequential to make that proof at this time anyway. We will rest on what we have offered.

Judge Hand: All right.

Mr. Wright: My associate calls my attention to the fact that the situation in the record as it now stands as to Exhibits 48, 88, 97, 100, 106, we should state that the offer of the interrogatory answers which are contained in those exhibits should include the answers to 50-A, 52, which were inad-
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vertently omitted from the descriptions opposite those exhibits.

Judge Bright: 50-A and what?

Mr. Wright: The answers to 1939 interrogatories, 50-A and 52. That applies to Exhibit 48. 48 as it stands merely refers to 51 and 53. These two numbers should be added. And the same thing applies to 88.

Judge Bright: What is the next one? 48. And what is the next?

Mr. Wright: 88.

Judge Hand: 50-A and 52 added to 88?

Mr. Wright: Yes. That is on page 36, and they should also be added to 100, which appears on page 47, and 106, which appears on page 53 of the list.

Judge Bright: The same interrogatory answers to each one of these, is that right?

Mr. Wright: 106 was already in evidence, but only as to 51 and 53. We are now including 50-A and 52.

Judge Bright: Is that the last one?

Mr. Wright: Yes. I am also informed that the defendants will now stipulate to certain testimony of Mr. Phillips, which would make competent the exhibits identified as 164 and 358, which were the statements of the theatre holdings of the United Artists Theatre Circuit, Inc., providing we agree that he would also give testimony which they have written (535)

out here which they apparently desire to have in; and with the understanding that that is, of course, their testimony and not offered by us, I have no objection to adding that to the stipulation as to what he would say, if called.

Judge Hand: This is 164 and 358?

Mr. Wright: Yes. I believe the stipulation is as follows: That if called to the witness stand Mr. Phillips, the vice-president of United Artists Theatre Circuit, Inc., would state that these two schedules, 164 and 358, are accurate statements of the holdings of that corporation in subsidiary corporations and in theatres as of March 30, 1940, that being 358; and March 1, 1945, that being 164, respectively.

Judge Hand: 164?

Mr. Wright: Yes. And that if further called as a witness—presumably as a witness for the defendants—

Mr. Caskey: Or on cross-examination.

Mr. Wright: (Continuing)—he would testify that United Artists Theatre Circuit, Inc. is a holding company organized for the purpose of investing its funds in the stock of theatre-owning companies; that it does not and never has operated any theatre, and that it does not and never has had any facilities for operating theatres. I suppose that means operating them directly, because as the chart shows, it does appear that it holds substantial interest in operating companies.

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Mr. Proskauer: I suggest that either Mr. Wright is going to take our stipulation or he is not. I don't know what these interpolations are, partly because I can't hear them. But we have done everything to facilitate him in this. This company has never owned any theatres or operated any theatres.

Mr. Wright: That he would further testify that United Artists Theatre Circuit, Inc. acquired its stock interest in Metropolitan Playhouse, Inc.—that is one of the companies referred to in the schedule—and thus indirectly its stock interest in Skouras Theatres Corporation and Randforce Amusement Company—that interpolation is the witness's and not mine in a 77B proceeding in this Court with the approval of Judge Mack.

That he would also testify—and as to this I have some doubt as to precisely what is meant—I think we ought to understand each other on this: that its affairs are separately conducted by its own board of directors, and that none of the defendants participate in the management of United Artists Theatre Circuit, Inc.

Now, I take it this is not intended to contradict the other evidence in the record that Mr. Joseph Schenck does act as the president of the United Artists Theatre Circuit, Inc., and that he is also associated with Twentieth Century-Fox; nor is, it, I suppose, intended to contradict the evidence we have offered as to the extent of the agreements which have

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been made between this defendant and other defendants.

Mr. Proskauer: Your Honors—

Judge Hand: I do not see any propriety in your talking about what they intend and all that by stipulation. If you are putting in a stipulation, put it in.

Mr. Wright: All right.

Judge Hand: That is a matter of argument.

Mr. Wright: That he would also testify that to his knowledge United Artists Theatre Circuit, Inc. has not conspired or combined with the defendants, or any of them, to restrain or monopolize interstate trade or commerce.

Well, we will stipulate that if permitted to testify in those terms, which calls for a conclusion—

Mr. Proskauer: I don't know what you are saying, Mr. Wright? Are you agreeing to it or not?

Mr. Wright: We agree that as to that statement that he would so testify.

Mr. Proskauer: That is all we are asking for.

Mr. Wright: (Continuing) —if permitted over our objection, that such testimony as that is irrelevant, incompetent and immaterial; because the conclusion he is attempting to draw is one for the Court and not for him.

Mr. Raftery: Mr. Wright, purely for the record, we did not consent over here. You said the defendants consented. (538)

At the opening of your statement of concession you said the defendants had consented to the introduction of the two exhibits and the making of that stipulation. Will you please eliminate us from your statement of concession, because we did not consent from over here. We never heard of it until just now.

Mr. Wright: I suppose the stipulation is not worth much if you gentlemen desire to contest the facts that are stated there.

Mr. Proskauer: Well, as to the five of us we will stipulate that on cross-examination Mr. Phillips would testify to what is on that sheet.

Mr. Wright: That has already been done.

Mr. Proskauer: I did not know what you meant by saying calling him as our witness, or objecting to something as irrelevant. We made a concession that we will let you put in that evidence as to what he would testify to if you would concede that on cross-examination he would testify to what is on that sheet of paper.

Mr. Caskey: Mr. Wright, I should have called to your attention—and I apologize to you—that at lunch time I made some pencil corrections in the corporate names on those schedules which may not have been called to your attention, but which I am sure are accurate.

(Government's Exhibits 164 and 358 for identification received in evidence).

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Mr. Wright: At this time I should like to rest our case subject to these qualifications that we shall of course continue to search for and attempt to locate I think one or two missing contracts and offer them when located. We shall also, of course, expect to incorporate in the record when produced some interrogatory answer data that has still not yet been furnished to us by the various defendants.

In so far as the charts are concerned that were marked in evidence, we shall follow the procedure suggested by your Honors, and in the event that an agreement can be reached, as I think it can, we shall also offer those. In the event an agreement could not be reached, we would have to call, I suppose, Mr. Borwick with his worksheets and have that testimony; but I think that in accordance with the Court's suggestion we can work out agreement on the mathematics of the charts and the descriptions that are contained in them.

Now, by attention is called to the fact that 181 has just been located, and we will ask that that be marked in evidence.

Mr. Proskauer: What is 181?

Mr. Wright: That is a license agreement for the exhibition of Loew pictures in Warner theatres.

(Government's Exhibit 181 for identification received in evidence.)

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Mr. Wright: My attention is called to 171, which we will withdraw at this time.

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And I also call attention to the fact that we have requested data from other so-called Paramount partners similar to that contained in the letters already received as Exhibits 167 and 169, and we should like, of course, to eventually incorporate that, as received, under the same kind of stipulation that the existing exhibits went in.

Mr. Seymour: It is correct, Mr. Wright, that the request for that information was made by you of the local companies, and you are waiting on them and not on us.

Mr. Wright: That is quite correct. We wrote them direct for that data and we have not received responses from some.

Judge Hand: Subject to these items, you close?

Mr. Wright: Right.

Judge Hand: Counsel were anxious to have time to get themselves together and organize for the defense. We think that three weeks is altogether too much, and we give you until a week from Monday at ten-thirty, and then go on full blast. So that we will adjourn now until the 22nd of October at ten-thirty a.m.

Mr. Seymour: May it be understood, your Honors, that when we come back we may then make any motions on the record we may want to make with respect to this case?

Judge Hand: Oh, yes, you may make any motions to reserve your rights. We will undoubtedly require you to go

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into your full case. As to your case, Mr. Raftery, we are not so sure.

Mr. Raftery: May we make our motions on the return day?

Judge Hand: You may do so the same day. Probably the Government can make clear just what their contention is as to whether we should require you to put in evidence or not.

Mr. Schwartz: May I make a further request of your Honors? In view of the fact that it is rather unclear as to

the position that the Government puts us in at the moment, if there is any brief or memoranda to be submitted by the Government, could we get a copy of it in advance so we could meet the issue squarely and save a lot of time?

Judge Hand: Do you want to submit any?

Mr. Wright: We should be glad to submit one if the Court desires it, and I will cover any specific points that you have in mind.

Judge Bright: I would like you to state exactly what you claim is shown by these exhibits. We haven't seen them. We haven't the slightest idea what you are driving at because we haven't read anything yet.

Mr. Wright: That is quite right. I was speaking with respect to United Artists, Columbia and Universal.
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Judge Bright: I would like you, on the whole case, either to make an oral statement, or submit some memorandum, just so we will know what you claim you have proved.

Mr. Wright: Our trial brief, I think, does in large part cover that, but I will be glad to furnish such supplemental argument as you desire.

Judge Bright: I think oral argument would do the trick, if you should be able to make an oral statement as to what you claim you have proven by this evidence at the time the motions are made.

Mr. Wright: Surely.

Judge Bright: Further briefs won't help us a whole lot.

(Adjourned until Monday, October 22, 1945, at 10:30 a.m.)

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New York, October 22, 1945,
10:30 o'clock a.m.

Trial resumed.

Judge Hand: You may proceed.

Mr. Proskauer: If your Honor please, before we proceed, may I avail myself of the opportunity to correct certain information contained in these F.B.I. reports which were made at the time we stipulated. We have carefully checked them, and I desire to record the following as our position after checking.

We do not concede that Waverly, Massachusetts, is a town of 25,000 or less. It is not listed in the Almanac and is, we believe, merely a suburb of Boston.

We do not stipulate that there is any such town as Collin, New Jersey. We know of no such town and none appears in the Almanac.

We do not stipulate that Bala-Cynwyd, Elkins Park or Willow Grove, Pennsylvania, are such cities since they are not listed in the Almanac, and we believe them to be suburbs of Philadelphia.

As to Amber, Jenkintown, Lansdowne and Prospect Park, Pennsylvania, we concede that they are towns listed (544)

in the Almanac, but we add that we believe them to be suburbs of Philadelphia, and that the theatres in Philadelphia take clearance over them.

As to Etna, Pennsylvania, we concede that it is a town listed in the Almanac, with the qualifications that it is part of the metropolitan area of Pittsburgh, over which Pittsburgh takes clearance.

As to Beverly, Bordentown, Bridgeton, Moorestown, Mt. Holly, Pennsgrove, Riverside, Swedesboro and Woodbury, New Jersey, we did not concede when we checked the Government's reports, that Warner had any theatres therein, and

we do not concede it. / We will, however, concede the fact that these theatres in these towns are operated by Atlantic Theatres, Inc., which has the sole right to manage them and purchase film therefor; and that Warner Bros. owns fifty (50%) per cent of the stock of Atlantic Theatres, Inc.; that the other fifty (50%) per cent is owned by Mr. and Mrs. Benjamin Amsterdam, who are not connected with any of the other defendants.

As to Delevan and Lake Geneva, Wisconsin, we did not concede when we checked the F.B.I. reports that Warner has any theatres therein. These theatres are owned and operated by Standard Theatres Company, in which Warner owns no stock whatsoever. We do not concede that we have an arrangement by which we get 25% of the profits of the operation of these theatres.

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The rest of my memorandum from which I am reading relates to certain other towns as to which Mr. Wright made an inquiry of us, but which I understand he has not yet put in the record; so I will reserve those.

Mr. Frohlich: May it please the Court, is it in order for the defendant Columbia to make its motion at this time to dismiss?

Judge Hand: Yes.

Mr. Frohlich: I should like to make that motion in some detail, if I may.

Judge Hand: Have you concluded your case?

Mr. Wright: If the Court please, we have, subject to the reservations that I made before. We have some additional material that has come in by way of supplementing what is already in the record, that is, answers to interrogatories that were not completed before, and there will be some of that material that will still come in from time to time. We can put in what we have.

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Judge Hand: Oh, we cannot keep this case open forever, to let material come in. You don't mean to say you are desiring to keep it open to put in material whenever you get anything? If it was important enough that might be done in any case, but we cannot have an everlasting performance here.

Mr. Wright: The sole reservations that I made——

Judge Hand: Never mind what you made.

Mr. Wright: Your Honor ——

Judge Hand: The question is, are you ready to proceed or rest? You have to do one or the other?

Mr. Wright: We are willing to rest on the material that is in the record, but, in fairness to the defendants who have furnished the interrogatory data, where they desire to furnish additional or corrected data, we have always had an understanding that we would make the addition or correction as it was presented to us. There are some of them who still haven't completed either getting the data or making such checks as they felt they ought to make, and that was the purpose of the reservation.

We also have this problem of these missing agreements which the defendants were not able to locate, and we haven't been able to find any copies, and as to those we have had to have the worksheets of the F.B.I. agents involved photostated, and are submitting those worksheets in the hope that (547)

a stipulation may be reached on those without the necessity of getting the agents, one of whom is some distance from the courtroom.

And, of course, as to the tabular material, we tried to follow your Honor's suggestion and submit that in revised form for further checking.

Judge Hand: You have had a whole week to further complete your case and we have to insist on termination.

Go ahead, if you have anything you want to introduce.

Mr. Wright: I have this morning the two documents that supplement Exhibit No. 230. That was the Warner lease of a Fox theatre in Philadelphia. The only document

that was marked was the lease made in December, 1944, which was terminated this summer. I have asked the Warner's counsel to furnish, and they have agreed to have incorporated in the exhibit the preceding lease.

Judge Hand: It was marked by us as in here. What are you doing here?

Mr. Wright: I beg your pardon?

Judge Hand: It is marked by us in our record as in already.

Mr. Wright: Yes, I am adding to the document that is in these other two documents that I will now describe.

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Mr. Proskauer: Prior leases that expired?

Mr. Wright: Yes.

Mr. Caskey: May I see them?

(Mr. Wright hands papers to Mr. Caskey.)

Mr. Wright: The lease dated July 28, 1936, and an extension agreement, dated July 31, 1939.

Mr. Proskauer: I don't know why you want to encumber the record with a lot of old expired leases.

Mr. Caskey: No objection, except as to materiality.

Judge Hand: Haven't you got masses of stuff in here that, if in your position is correct, sufficiently establishes it?

Mr. Wright: That is correct, your Honor, but in this case the document we were interested in was the one that I have just offered here and not the one that was actually produced. That is, the one I am now offering is the one that is tied to the Fox franchise in Philadelphia and that is the lease that I had inadvertently supposed we got the other day. We did not get that; we got the later lease. And I wanted to put in the one I intended to have in, that is all.

Judge Hand: All right.

Mr. Caskey: What numbers will they bear?

Mr. Wright: I suggest that these be marked 230-A and B respectively, that is, the July 28, 1936, document A and the extension of July, 1939, being marked 230-B.

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(Marked Government's Exhibits 230-A and 230-B.)

Mr. Wright: And we also had marked for identification a letter from United Artists, dated October 17, 1945, bringing up to date the data as to the officers and managers of the corporation, which is marked for identification as 372, and we also had marked letters received from a couple of affiliates of Paramount, showing the relationship between those companies and the defendant Paramount, one of them dated October 4, 1945, from North Ohio Theatres Corporation, marked for identification as 373, and Publix Rickard Nace, Inc., marked for identification as 374, dated October 6th.

Mr. Seymour: May I see those?

Mr. Wright: Yes (handing).

Mr. Seymour: All right, Mr. Wright.

Mr. Wright: We will offer these with the understanding that the defendants are agreeable to making the same stipulation with respect to these letters as the others, in order to avoid calling the witness to testify to what is in the letter.

Judge Hand: Where are they on the printed list?

Mr. Wright: These are not on the printed list that your Honors have there, because it did not come in until after that was made up.

Mr. Proskauer: The only thing I could hear was the (550)

"stipulation." If I am going to stipulate something, I want to know what it is that I am stipulating.

Judge Bright: Is that the stipulation, that they are received subject to correction, if the information is not complete?

Mr. Wright: Surely.

Mr. Caskey: That is 373 and 374?

The Clerk: 372, 373 and 374.

(Marked Government's Exhibits 372, 373 and 374 in evidence.)

Mr. Wright: If the Court please, we were also in the process of attempting to work out further stipulations with

the defendants with respect to this data which was given by the F.B.I., but, in so far as we are concerned, it is not essential to our prima facie case, and we are content to rest without it. I assume if the parties desire to have it incorporated in the record at a later date, we can put it in.

Judge Hand: In other words, they will really come in either in their case or in rebuttal?

Mr. Wright: Or in rebuttal.

Judge Hand: All right, plaintiff rests.

Mr. Frohlich: If the Court please—

Judge Hand: I should not make any protracted motion here, because I do not believe it is in the slightest degree (551)

likely, after going over these decisions, that we are going to dismiss at this stage of the case. If you want to make a formal motion, all right, but we are not going to dismiss now.

Mr. Frohlich: I should like to make a formal motion on behalf of Columbia Pictures Corporation to dismiss.

Judge Hand: All right.

Mr. Davis: If the Court please, on behalf of Loew's, Inc., I wish to present a formal motion to strike out so much of the testimony as does not relate to Loew's, Inc. on the ground that to this time there has been no showing of any conspiracy, concert, or agreement between the parties. I will not argue it and present it in writing and will pass it to the stenographer to be incorporated in the minutes.

Judge Hand: Yes, all right.

(Mr. Davis's motion will be found at the end of the day's proceedings.)

Mr. Seymour: May it please the Court, I have a motion to dismiss the petition in so far as it asks for the relief reserved and also to strike, and I would like leave to hand it to the stenographer and have it copied in the record because I rather assume your Honors will reserve decision on these motions at this time.

Judge Hand: Yes.

Mr. Proskauer: Your Honor, to save time, may it not be (552)

understood that each of the defendants severally makes the corresponding motion in its own behalf inter alios mutatis mutandis; that is, we move to strike all the evidence that does not relate to Warner Brothers on the ground that there has been no conspiracy proven, and we join in the motion presented by Mr. Davis and the motion presented by Mr. Seymour, making it severally on behalf of our respective clients.

Mr. Raftery: For the sake of the record, I join, first, in the motion to strike. Now, formally, I want to move to dismiss the complaint or the petition as to Universal Pictures Company, Inc. on the undisputed evidence that that company is not engaged in any business but production; it is not engaged in distribution; it is not engaged in the theatre business; and there is no proof of any kind against Universal Pictures Company, Inc. That is separate and apart from the distributing defendant which is before this Court. As to that defendant I press the motion to dismiss.

Judge Hand: We will reserve decision on all these motions.

Mr. Raftery: And as to the defendant Universal Film Exchange and Big U I move to dismiss on the grounds that the plaintiff has failed to prove facts sufficient to constitute a cause of action.

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I make the same motion as to United Artists Corporation on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action.

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Judge Bright: Mr. Wright, do you claim in this case any monopoly or restraint of trade in production?

Mr. Wright: To this extent only, that the effect of this market control which is, we say, made effective through distribution practices and theatre ownership of these defendants, does, to some degree, restrict production opportunities.

That is, the production situation is this, as we see it, and that is that anyone who wants to produce a picture and has got money to finance it, and a story and star, and can get a major release, can make the picture; but that the releasing system is such, the market is so controlled, that the producer, even the so-called independent producers, are dependent upon a major release in order to return the cost of an expensive picture. And to that extent we say the facts we have shown with respect to this market control do restrict producers' opportunities as well as those of distributors and exhibitors.

Judge Bright: Well, what evidence is there in the case that there has been any such thing as that occurring at any time during the period which you have covered by your evidence?

Mr. Wright: Well, there is no evidence as to a specific competitive injury to a particular producer. I simply say that as a matter of argument we would urge that one of the (554)

effects of market control of this kind is necessarily—that is, in and of itself—the very existence of the control does limit the opportunities of so-called independent producers.

Judge Hand: How does that make this particular independent producer a co-conspirator?

Mr. Wright: I did not allege that independent producers were co-conspirators. By "independent producer" now I am using the term to refer to somebody who puts his money into a picture and acts independently of any distributor or exhibitor in that respect.

Judge Hand: Which one of these is such?

Judge Bright: Universal is only engaged in production.

Judge Hand: All right, Universal. How do you hook up Universal?

Mr. Wright: Well, the producer, Universal, is hooked up, I believe, through one hundred per cent stock ownership with the Universal distributor. That company is a part of a group of corporations that form what we have referred to here as the Universal defendants. Universal is no sense an inde-

pendent producer in the sense that I was using the word—that is, a producer who is independent of any of these major distributors in his production activities. And we say that even as to those who are independent through absence of any (555)

stock affiliation or ownership affiliation, they are dependent on these eight major companies for a release of their product to the extent that they want to make pictures which require large investments and need to be exploited in the metropolitan centers in order to return the cost and a profit.

Judge Bright: Well, you allege in your complaint a combination in restraint of trade and a monopoly in production.

Mr. Wright: Yes.

Judge Bright: And a similar thing in distribution?

Mr. Wright: Yes.

Judge Bright: And a similar thing in exhibition?

Mr. Wright: Yes.

Judge Bright: Now you say that inasmuch as there are restraints of trade and monopolies in exhibition and distribution, that ipso facto that creates a monopoly or restraint of trade in production?

Mr. Wright: Ipso facto we say it does create at least a restraint. It does not create a monopoly to the extent that nobody else can produce pictures, because other people do produce pictures. *

Judge Bright: It is a fact, isn't it, that there is real competition in production?

Mr. Wright: There is competition to this extent: there (556)

is competition, as outlined in the opening statements, with respect to story properties, for example. I do not think there is any question about that. Various producers bid in opposition to each other for those literary properties. To a lesser extent there is competition in signing up talent, although that is to some extent nullified by an exchange of so-called production talent among the producers. But there is no question but what there is a marked difference in the extent

and character of the control which the defendants here are able to wield over production and the extent to which they control distribution and exhibition. But their control of distribution and exhibition does have restrictive consequences in the production field.

Judge Bright: Well, you say does have? Or might have? Which do you mean?

Mr. Wright: Does, definitely. I mean it does exist. You have this market control existing, and it has continuously existed for a substantial period of time. So, as I say, in order to exploit this market, your producer, whoever he may be, is forced to rely for an outlet on these distribution companies.

Judge Bright: Has that in any way restricted production so far as any specific evidence is concerned?

Mr. Wright: Well, if you are talking in terms of (557)

numbers of pictures produced, I suppose the evidence shows that there has been a lesser number released. However, it is purely a matter of argument as to what you attribute the release of a smaller number of features to. Simply concentration on high quality, high cost of pictures is one explanation of it. But I would concede that the evidence you have before you does not show that any particular independent producer who wanted to make a picture could not get it released by one of these distributors.

Judge Bright: Or has not?

Mr. Wright: Or has not, yes. If he can make—

Judge Hand: Now, is Universal put in here because it is a producer or because it controls a distributor?

Mr. Wright: Because of its affiliation with the distributor, Universal Film Exchanges. It is part of that combination.

Judge Hand: In other words, as a producer there is no case against it?

Mr. Wright: Separately, no. That is quite right. Separately considered there would be no case against it.

Judge Hand: Separately considered?

Mr. Wright: But it is a part of —

Judge Hand: Why don't you answer the query? As a producer there is no case against it?

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Mr. Wright: That is correct, yes, sir.

Judge Hand: All right, that clarifies some part.

Judge Bright: That applies to all of the producers as such?

Mr. Wright: Yes, considered individually.

Judge Bright: Well then your case is aimed at distribution and exhibition in combination?

Mr. Wright: Quite so.

Judge Bright: Practically entirely, isn't it?

Mr. Wright: The other is merely an effect of what we have proved as to this, because they have a distribution monopoly, and restraint of trade does have an adverse effect, we say, on production activities, but that is the extent of the claim.

Judge Hand: It would have an adverse effect you would say against others than any particular defendant; it would have no adverse effect against them?

Mr. Wright: That is correct.

Judge Bright: If I understand you, if I wanted to produce I would hesitate to do it, anticipating that I might not get a market for my films; is that the idea?

Mr. Wright: I think you have a reasonable assurance that if you are a competent producer and can make a good picture, you can get one of these companies to release that film for you. But you do have a limited number with whom
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you can bargain, and you are dependent on one or more of them for the terms on which you release it. I would suppose that you as a producer would conceivably be better off if the distribution market were such that it were not con-

trolled by eight companies. If you had twenty or thirty possible distribution outlets, I would assume that your production opportunities would be somewhat more competitive than they are today.

Judge Hand: Then you could not have any case, for instance, against Paramount as a producer; the case that you would have as regards Paramount would be the attempt of the other producers to restrict Paramount, and vice versa, the interlocking business. You could not have any case against any individual as a producer?

Mr. Wright: Quite right.

Mr. Raftery: If your Honors please, I did not want to press my motion or argue my motion, but this last colloquy brings me back to asking your indulgence for five minutes.

There is no more evidence in this record against any one of these three distributor defendants—and I refer to Universal, Big U, and United Artists as individuals—and that is the only way we can be classed in this lawsuit—than there is on the production issue.

Mr. Wright has put in evidence nothing but two blank (560)

forms of contract, some individual contracts with some of the individual exhibitors, showing that United sold pictures, we will say, to Warners or some of the others at a price, at a film rental; some of the contracts carried clearance; others did not. There is no proof in the record that the clearance was reasonable or unreasonable. There is no proof in the record that the price was right or wrong. They are just bare skeletons, as one of your Honors remarked the first day, and I challenge Mr. Wright to show your Honors any one way where any contract offered in evidence comes within the Interstate case, the Crescent case, U. S. v. Paramount, or U. S. v. First National.

He told us on Thursday morning, October 11th, that those four cases were the milestones. In the Interstate case there was a specific finding of conspiracy among everybody. In

the Interstate case, Justice Stone, who wrote the prevailing opinion, said in effect that any one of the distributors could have put any one of the restrictive provisions in that contract that O'Donnell secured down there, provided they did it separately and independently. He also said in reference to the Paramount-Texas Consolidated affair—that is where Mr. Wright argued there could be a separate conspiracy; that is where they were discussing copyright—and in that said, granted that Paramount could have used that clause, if they (561)

did it by virtue of their copyright. He says they did not. They did it because they were forced to do it by the O'Donnell letter. That case is based entirely on conspiracy and monopoly.

In the Crescent case there is nothing in that but the trial of some situations that none of these defendants were involved in, and it is *res adjudicata* as to that, and that is out of this case.

In *U. S. v. Paramount*, tried in this court, the bill of complaint charged that the defendants formulated, adopted and agreed to use exclusively a standard form of contract with compulsory arbitration provisions. The answer admitted that charge. And on that and on that alone, Judge Thatcher found conspiracy, an agreement to use exclusively compulsory arbitration; and the arbitration decision is based on that.

In the Credit Committee case it was a similar bill and answer trial, with an admission of conspiracy, and Judge McReynolds in the Supreme Court held that was against the law.

There is not one bit of evidence in against these little three, and as I pointed out on the opening day, we are being subjected to sitting through this entire trial with the hope that somehow during the trial Mr. Wright will supply some (562)

evidence against us; and I must press our motions at this time or ask Mr. Wright, and I challenge him, to produce one

bit of evidence that bring us within any of those four cases which he says are the milestones.

Judge Hand: What about the Goldman Theatres case?

Mr. Rattery: In the Goldman Theatre case, if your Honors will look at the opinion, Judge Kirkpatrick found that there was a theatre called the Erlanger Theatre, run by a man named Goldman, and that each of the defendants refused to sell him any pictures.

The second finding was that if the theatre had been run by Warners and not by Goldman, they would have sold pictures to that theatre; and they held it was a discrimination; and that has nothing to do with the case here. It has been litigated, it has been tried, the Government appeared as *amicus curiae* in it, and there was the matter of assessing damages.

Now in that case you had a specific finding of agreement not to sell. There is no evidence in this record of that kind; there has not been one bit of evidence put in here that any exhibitor or any member of the public has been affected by anything done by any of the companies represented at this table; and that is the reason that we feel that Mr. Wright should point up to this court where we come under any of these cases, where we have violated the law, other than drop-
(563)

ping in eight hundred contracts as to one defendant, a few hundred as to another, none of which contain any of the provisions that have been condemned in any of the judicial decisions. And that is the reason we feel that a great injustice is being done to these smaller defendants, being compelled to go through this long and protracted trial, with no proof by the Government as to any law violation by any of us.

Mr. Proskauer: May I suggest, your Honors—you mentioned the Goldman case—

Judge Hand: I am going to suggest—I will begin with Mr. Seymour—that there be a little discussion in answer to Mr. Wright's argument of the Interstate case, the Crescent case, the Goldman case, and also with regard to price fixing. This may be obvious to you, but I should like to hear what

you have to say about cases like *Bobbs-Merrill v. Straus*, where they fixed a price on the resale of books. Now this does not fix any price, of course, in one sense.

Now go ahead, Mr. Seymour, if you have anything you want to say.

Mr. Seymour: Your Honor asked me some questions which I cannot answer at the moment, but I will do my best.

The Interstate case I think is correctly analyzed by Mr. Raftery when he says that depended upon a conclusion of a (564)

specific conspiracy. There there were identical letters sent out by a dominant exhibitor, and no explanation of those letters; and the court concluded that there was a conspiracy. That was the situation in a circuit down in Texas—

Judge Hand: What is that, Interstate you are talking about?

Mr. Seymour: *United States v. Interstate*, and I think that case depends on these particular facts, depends upon the finding of conspiracy; and as I read the majority opinion, it squarely reserves the right of the copyright proprietor to protect himself as a matter of individual action. And that is what this case will show.

Now, as far as *Crescent* is concerned, Paramount was not a defendant, was excused, although originally named was excused, and nothing in that case can operate as a finding or determination against Paramount. That was a local—

Judge Hand: Well, I do not think that makes any difference. It is a precedent, you know. He was suggesting it was *res adjudicata*.

Mr. Seymour: The essential basis of that case is the evidence which the court relied on for its findings of the improper exertion of buying power by an independent circuit proprietor. That is an independent circuit, a circuit not (565)

affiliated in any way with any of the defendants in this case.

Judge Bright: Why was Paramount excused in that case? Because it consented to the decree in this case?

Mr. Seymour: It is my impression, if your Honor please, that that case was pending when the consent decree was entered, and at that time Paramount and the other defendants who participated in the consent decree were dropped.

Judge Hand: You are talking about Crescent, I think, and not Interstate.

Mr. Seymour: I am now talking about Crescent, because I think the Interstate case depends upon the particular facts in the light of a particular conspiracy which the court inferred from the fact that the defendants did not explain why it happened.

Now in the Crescent case, first Paramount, and certainly these other defendants were not in the case during the trial and did not get heard.

Judge Bright: That is, the five majors were taken out because of the filing of the consent decree in this case?

Mr. Seymour: That is my understanding.

Now that case is a case involving an independent circuit, not theatres affiliated with these defendants, and it depends upon the particular facts found in that case with respect to the abuse of the buying power by that independent circuit. (566)

In other words, that independent circuit used certain methods which the court found justified relief, but that defendant is in no way connected with any of these defendants, and none of them are chargeable with what it did. So that case, I think, depends upon its particular facts, and points up the fact that in competition with the theatres of Paramount, or in which Paramount has an interest, there are a number of independent circuits in this country having, as the Crescent case shows, great power, a power which they are quite prepared to use to make the problem of distribution of pictures and the problem of protecting the revenue of the exhibitors and producers, extremely difficult. If anything, that case is an argument against any such relief, to hamstringing the producers and exhibitors, as the Government asks in this case.

Now the Schine case, recently decided by Judge Knight is a case of the same character. In that case Paramount was excused as a defendant upon the entry of the consent decree, and the case depends upon particular practices by an independent circuit, a circuit not in any way connected with these defendants; and your Honors will see from these two cases, Crescent and Schine, the sort of problems that the distributors meet; and there are at the present time some hundreds of circuits—some of them are not as large as Crescent and Schine—but hundreds of circuits, and the problems (567)

that the distributors have, to sell their pictures and make a fair revenue in the teeth of such problems as are presented in the Schine and Crescent cases.

Now I am not prepared to discuss the Bobbs-Merrill case at the moment. I would like to say generally that it is our position—

Judge Hand: Well, that was the beginning of all this stuff in copyright. That is where they sued Bobbs-Merrill and Scribner in two cases for tie-in contracts really. It was the predecessor of the Patents case, the Motion Picture Patents case.

Mr. Seymour: I think there was a sale involved in those transactions.

Judge Hand: Yes.

Mr. Seymour: There is no sale involved here. The problem here under the copyright law is the right of the copyright proprietor to grant a limited right of exhibition under a license, he retaining his full copyright rights, but subject only to that limited grant; and we will satisfy your Honors, I think, as to the reason for the various protections that have been included in license contracts since long before any of these defendants had any interest in theatres.

Now the ones principally challenged here are—

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Judge Hand: Oh, yes, that is perfectly true, but you have not really yet pointed out to me why there should be

a difference between a license and a sale. In other words, everybody thought this was true, in the case of a sale. Those cases turned up, and those cases were to the effect that they could not control—well, subsequent events, after they had parted with their title. Now here they let a man exhibit their film with an upset price. Supposing instead of having an upset price they simply had a royalty, just a straight royalty, with no maximum-minimum or anything else—that would certainly be all right, wouldn't it?

Mr. Seymour: Well, I would think it would, and I think that—

Judge Hand: Well, I do not think anybody would claim that was not all right, unless there was some general conspiracy.

Mr. Seymour: I am sure that is so, and this is, in substance, another way of fixing the reward, and I can show your Honors that.

Now I think the difference between the problem here and the problem in the Bobba-Merrill case, without attempting to analyze it at length, because I am not prepared to do it—I think the essence of that case is, there was an attempt to control the price beyond the first sale.

(569)

In other words, the same problem met in the General Electric case, which is still good law.

Judge Hand: Oh, yes, of course, that is perfectly true. This, of course, is an attempt to control the price of admission after the first exhibition.

Mr. Seymour: Now let me explain that to your Honors because I do not know that it has been made clear. First, it is not an attempt to control the admission price after the first exhibition.

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Judge Bright: Isn't it, in effect, an attempt to do that by applying clearance and these run rules so that subsequent sales or subsequent licenses will be at a price that is impliedly fixed?

Mr. Seymour: I do not think so, if your Honor please. It is true that by reason of the aging process of films, the subsequent-run exhibitors are unwilling to pay and are unable to pay as high a revenue as the first-run exhibitor, and in a sense that is a result of the fact that a first-run was granted an exhibitor, and was protected by clearance. But there is no relationship between the first and second-run licenses. In other words, there is no license for first-run and the second run and the third run which attempts to control it. They are separate license contracts, each protecting the legitimate interest of the distributor in the revenue from that picture on that run.

Judge Bright: Well, it protects the exhibitor, too, doesn't it?

Mr. Seymour: There is no question about that fact.

Judge Bright: In other words, the first-run man will be expected to be protected by clearances or runs which are subsequent to his?

Mr. Seymour: There is no question about the fact that the clearance provision which gives the first run clearance over a subsequent run is a provision in which the first-run (571)

exhibitor has an interest. But the main interest in the clearance provision is the distributor's interest in insuring himself the largest possible revenue.

Now, with this copyrighted article, he is entitled, staying within the law, to get an assurance of the largest possible revenue for his copyrighted work he can get; and I submit that the method used, the reasons for which we may develop by testimony in this case, the method used of providing a run, first, second or third, and licensing so that the distributor receives either a flat rental—which is really like the royalty which you suggest—or a movable rental—which is the percentage arrangement—is a proper method for him to get the reward for his copyright.

Now, the clearance provision, which was specifically recognized in this consent decree as a necessary element in the sale of pictures is a protection to the copyright proprietor for

the revenue which he can receive first run. Now, the fact that it is incidentally of value and importance to the first-run exhibitor does not affect its legality; and despite the observations in the dissenting opinion, *U. S. v. Interstate*, it seems to us that the majority opinion does not strike at the right to have reasonable clearance arrangements. And this consent decree squarely recognized it; and the Fourth Circuit, in (572)

the *Westway* case, which is cited in the brief, has indicated that the *Interstate* case—Judge Chesnut's decision which was upheld in the Fourth Circuit, indicated that the *Interstate* case does not touch this situation.

Now, we will develop, I think, through evidence that through the protection of the distributor's revenue, which he has to have in order to get his money back on his pictures requires these protections, and that they are individually arranged.

Now, the essential part of the Government's attack here is some theory of conspiracy; that they are arranged by conspiracies between the distributors. Now, that is not the fact, and we will show it to your Honors. Each one of these contracts is separately made by the distributor and exhibitor.

Judge Hand: of course, they have made a claim that is greater than that. They have made a claim under the *Interstate* case that you simply cannot use a copyright this way in such licensing agreements, and that is what prompted me to ask these questions. My mind is extremely fluid in regard to this complex situation, which is very complex, but I am sure it is going to be decided on some of these general principles and not whether Brookline is part Boston or is still an independent town, and all that detail that you are talking about.

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Mr. Seymour: I think it will, too.

Judge Hand: That will do nothing in the end but take up time.

Mr. Seymour: I think when your Honors have heard the testimony as to how these contracts are made and why they are made this way, you will be satisfied that they are made to protect the revenue of the copyright owner, and that this is a legitimate protection, and I do not think that the Interstate case stands in the way of it for a minute.

Judge Hand: Of course, Mr. Seymour, with an equal zeal they argued all these things, that they were necessary protections, those old tie-in contracts, to carry out the rights of a patentee, to carry out the rights of a copyright owner. Scribner and Bobbs-Merrill said that it was absolutely horrible to have R. H. Macy & Company dumping their books on the market so cheap that it would spoil their original sales. As a matter of policy you are getting fairly close, I think. (574)

Mr. Seymour: I think not, if your Honor please, and I hope the virtue of our position won't—

Judge Hand: It is something that intellectually puzzles me somewhat. Now, as I remember it, in this Goldman case they laid a great deal of stress—this is on an entirely different point, but the Third Circuit laid a great deal of stress—that has not gone up yet—on the current practices of the defendant.

Mr. Seymour: The Goldman case is another case which depends upon the particular fact in that case, and Judge Proskauer, whose client, Warner Brothers, was particularly involved, will, I am sure, be glad to discuss that with your Honor, but I just want to say this: our zeal in defense of this system which has been in effect since at least 1916 or 1917 in this industry, ought not to be taken against us, because other counsel were equally zealous when they were wrong. This case is squarely within, by analogy at least, United States v. General Electric, which has withstood every effort of the Government to cut to down.

Mr. Proskauer: May I say a word to try to meet what is in your Honor's mind as a source of puzzlement? I take now, for my text a note in the Government's brief, "Even if

individual control by a single distributor of admission prices for its own pictures were justifiable as a privilege impliedly (575)

enjoyed by a copyright owner under the Federal Copyright Act, statutory immunity for price-fixing cannot save a price fixing combination."

Without making any concession that is my idea of the law.

Mr. Wright: I don't think you read the full note, did you? You left out the last part.

Mr. Proskauer: I am sure I read all that was essential. If your Honors think I did not, I apologize. "Even if individual control by a single distributor of admission prices for its own pictures were justifiable as a privilege impliedly enjoyed by a copyright owner under the Federal Copyright Act, statutory immunity for price-fixing cannot save a price fixing combination which operates both within and outside the statutory authorities."

I believe I read all that was essential in that note the first time, and it is not my habit to misstate anything to a court.

What is this price fixing talk that has been injected into this case? Let us forget copyright for a moment. If I have a boxing kangaroo, I suppose that I am entitled to show that boxing kangaroo all over the United States for a percentage of the gate receipts and to fix the gate receipts. Here, instead of having a boxing kangaroo I have a copyrighted motion picture. I am entitled to show it. I am entitled to take (576)

a percentage of the profits, of the take at the gate, and I am absolutely entitled, in the absence of conspiracy, to fix the price which is to be charged to compensate me and be the basis of my percentage.

The Macy case is not in contradistinction to that. What the Macy case held was that if I publish a book, and I sell that book, not licensed, sell it, and I have no more interest in what my vendee does with that book, that is, no more direct

interest, that I cannot arbitrarily say to him, "I forbid you to sell that book for what you please."

And when your Honor suggested tentatively, as you did a moment ago, that perhaps there wasn't any distinction between the license and the sale, I think practically your Honor overlooked the enormous area of difference between the conduct of a man who sells a book and who is not directly interested in what the book is resold for, and a man who does not sell a motion picture but licenses the production of it on a percentage basis and is directly interested.

I have talked practically. Now I will talk legally. The distinction that I have made practically is absolutely carried out in the General Electric case, to which my colleague, Mr. Seymour, referred. The distinction between a resale and a license has a legal foundation and it has an enormous practical foundation; and I suggest that when we develop this case the real issue here will be on the Government's tender of the argument that we were guilty of a conspiracy. If we were not, that is the end of price-fixing, as we see it. If we were, that brings on more talk and I am going—I can hardly envisage a finding that we were, because, as Mr. Seymour has indicated, the proof will negative any thought of a conspiracy.

That brings me to the next step in what was suggested by your Honor's observation, the Goldman case. Let us assume arguendo that I was all wrong on this price fixing. I could conceive—I could conceive—if you find that, of your enjoining us from doing whatever everybody has done in the theatre business, in the motion picture business, in every kind of exhibition business for a hundred years, that is licensing for exhibition with a percentage and a provision for what should be charged to the public. I could conceive of the remote possibility of your Honor's enjoining that, but my friend comes along and says, "no, no, no, we don't want that. We want a complete divorcement of theatre ownership from production," and that is burning down the house to

roast the pig, as I said in my opening before Judge Goddard.

Coming to this Goldman case, I would be less than candid with this Court if I did not admit that in a number of local situations there had been decisions against these defendants. I would be less than candid if I did not direct your Honors' (578)

attention to the enormous difficulties in the practical operation of this business. No matter how lily-white one tries to be, we have been subject to the depredations of the Schines and the Interstate Circuit and the Crescent people, coming down on us with their enormous buying power and coercing us into doing things that the courts have held were wrong.

The only case of all these in which the gravamen of the offense was not such as to make us victims rather than perpetrators of wrong is the Goldman case, and I am going to be frank to admit that, let us assume we were all wrong in the Goldman case, and I do not believe we were for reasons that I shall suggest to you, here is a purely local situation growing up out of a history that I indicated in my opening I am going to develop to your Honors by testimony, here is a theatre which a man named Goldman buys, leaving our employ, Warners' employ, where he had an enormous salary, and he goes out and starts in opposition to us and he buys an old theatre, that had been erected in the heyday up on West Market Street—and your Honors must pardon me for a little detail here because the Goldman case was on the front page of the Law Journal, by strange coincidence, and I am sure it must be in your Honors' minds.

Judge Hand: That Erlanger Theatre in Philadelphia you are referring to now; aren't you?

(579)

Mr. Proskauer: Yes, I am referring to that. West Market Street was a street that backs up on the Pennsylvania Railroad embankment, and years ago there was a plan to take down the embankment and West Market Street was going to blossom, and two great theatres were erected there, the Erlanger, which is now in the sticks, in a theatrical

point of view, and the Mastbaum, which our people built. We built also the Erlanger in combination with other people and we gave it up to the mortgagee, losing some four or five hundred thousand dollars and abandoned it years ago. That is what we thought of that theatre.

Now, Goldman comes along in the war period and he says, "I have got this theatre and I am going to every company around and I am going to demand that you take your pictures away from the theatres where you have been showing them for years and give them to me," and every single theatre-producer refused to do it, and the Court inferred, the Circuit Court did, from that unanimity that we had all agreed to boycott Goldman.

Judge Hand: Has anybody applied for a writ in that case?

Mr. Proskauer: We are about to do it, and we are debating whether to apply for a writ before or after the fixation of damages, your Honor. We have got a practice question there.

(580)

Judge Hand: I see.

Mr. Proskauer: But we are certainly, as we are now advised, intending to apply for a writ.

Judge Hand: I suppose they would not be very likely to grant it until the case was completed.

Mr. Proskauer: That is what is bothering us, your Honor, and I think that is what we shall have to do.

Judge Hand: Yes.

Mr. Proskauer: But I am not going to ask you to overrule the Goldman case; I am going to ask you to assume arguendo the correctness of the holding in the Goldman case as applying to a most peculiar, separate and unique situation, and it may well be that you will say,—I don't know, I am going to argue against it,—Warners ought not to own all those theatres in Philadelphia. As a matter of fact, we don't have them all now. You may say, "Well, you did wrong when all of you separately say you won't

sell Goldman, a poor victim of a conspiracy,"—who admitted he was making a quarter of a million dollars a year by the organization of this fight on his former employers, Warner Brothers. You may say that and you may say that the Court was right in saying that in this local area relief should be given, but again I venture to suggest that the gap between that and the Government's position, that there is a general, (581)

nationwide conspiracy, where territory is carved up by agreement and where these theatres are used for some sinister purpose, and, therefore, we must be absolutely destroyed by this theory of divorcement, the gap between that is as wide as the gap between heaven and earth.

Judge Goddard: Mr. Wright, you referred to clearance quite frequently, and I am not sure that I understand just what the issue is as to clearance. In article VIII of the consent decree the Government stipulated or conceded that clearance, reasonable as to time and area, was essential to the moving picture industry. Is it the Government's position now that that is wrong, that it is not essential, or is it the Government's position that it is essential but that these defendants have violated it by imposing clearances that were not reasonable as to area and time?

I don't want to take a lot of time, but if I could get simple answers to that, it would help me.

Mr. Wright: Yes; well, I think that our contention is that the clearance has been abused, that these defendants have so organized the clearance structure that it no longer has any real purpose of protecting copyright privileges, but is organized for the purpose of protecting theatre operating profits and, of course, the ownership of the five principle distributors of the five largest theatre circuits has weighted the (582)

practice in favor of the device as a theatre operating profit protection rather than as a copyright protection. That is the essential thesis, I think, of the case.

Judge Hand: That is the kind of extremely vague argument that leaves me very cold. It is terribly vague. You say that it is not done to protect the copyright, but it is done more in the interest of the exhibitors. How in the world am I going to tell that, and how does that kind of argument spring from anything except a general attitude? If you read it, you would find a great deal of parallel cases, and a great deal of interest, in the book called "This Age of Jackson," where they thought for years that everything was a monopoly—everything was a monopoly—and objected to it on that ground.

I think it may be that under an extension of these decisions about sales and tie-in contracts, that this may be illegal; but to say that it is not a protection of the copyright, I must say, seems to me very unreasonable.

Mr. Wright: I would say that, of course—

Judge Hand: And I should think it was a very great protection to the copyright. Of course, when I first became district judge, I was catapulted right into *Victor Talking Machine v. Straus*; I wrote the opinion in the Circuit Court of Appeals here in the Motion Picture Patents case, which was a case of infringement invalidating contracts on a dif-

(583)

ferent ground, not a violation of the Sherman Act, and we went under the Clayton Act, and great lawyers and great judges—in *Bower v. O'Donnell* and in the other case, where Judge Holmes was always for the patent owner and for the copyright owner—were on the other side. These arguments now are not foreign to those. Those cases and the copyright cases may not be conclusive at all on this case, and I do not suggest that they are, but that kind of consideration was in the air, but I do not see how you can claim that this is not an important protection of the copyright. The copyright will become, undoubtedly, almost worthless, or worth little, if there is no protection as to the price paid on other runs. Won't that be so?

Mr. Wright: Let me say this: When I said that the restrictions were not within—were not for the purpose of advancing the copyright, I meant that they are not within the limits that the courts have said the copyright owner may go.

It is true, perfectly true, that the owner of the copyright may decide that the most satisfactory way to exploit a particular area is to do it through a theatre operating monopoly; that is, it may be perfectly true that a theatre operating monopoly in an area, providing that the copyright owner gets a satisfactory percentage of the monopoly profits in the area, (584)

may be the best financial deal that the copyright owner can make in the area, that is, that that kind of system of copyright restriction will yield him more money than any other system. And in that sense those restrictions are protecting his copyright, but I say that that kind of use of copyright or patent restrictions is one which the courts, for at least the last six or seven years, have been unwilling to tolerate, and that the argument I am making for it does not require any extension of existing doctrine at all; that that falls squarely within this line of both copyright and patent cases, which hold that you cannot use your copyright or patent restrictions for the purpose of bolstering up somebody else's monopoly merely because it is more profitable for you to market your product through that monopoly, and that is our position. It is a question of law there rather than fact. We could never, as your Honor suggests, hope to show that these restrictions were not profitable to the owner of the copyright. Certainly, the way these people have the industry organized and the use of these restrictions, it is perfectly rational from the standpoint of yielding the maximum profit to the distributors. It does, however, have competitive effects which the courts have been unwilling to sanction.

Judge Hand: Do you claim that such restrictions violate (585)

the law if the copyright owner is not combining consciously

with other people who have obtained a monopoly? You are putting him in the position, aren't you, of a kind of contributory infringer or something? Of course, he cannot be a contributory infringer because he owns the copyright.

Mr. Wright: I think the difference between the defendants and ourselves on this combination question is this: We say that in order to show a law violation in the use of these restrictions, we have only to show a combination between the distributor and the holder of an exhibition monopoly. They say that the distributor, acting apart from other distributors, can impose any restrictions he pleases and that he cannot be guilty of conspiring or combining with a theatre operator or group of theatre operators for the purpose of unreasonably restricting the competitive opportunities of that theatre operator's theatre opposition in showing the films. That is where the fundamental difference, as a point of law, is between us.

Mr. Proskauer: Your Honor, may I get a clear understanding of that? It would help us very much.

Judge Hand: Let the stenographer read it.

(Record read.)

Mr. Raftery: I do not concede that, your Honor. That (586).

is not the difference between Mr. Wright and these defendants here. The difference between—

Judge Hand: We cannot have everybody hopping up. Are you through, Mr. Proskauer?

Mr. Proskauer: I am going to be through by asking your Honor one question and then I am going to turn it over to Mr. Davis. I would like your Honors to inquire whether Mr. Wright has any authority to the effect that a license without conspiracy, which fixes the prices at which exhibition is to be had for percentage, is, ipso facto, illegal? Is there any authority that he can cite for that proposition of law?

Mr. Wright: We have never offered such a proposition of law. The vice in these agreements is that they do not

merely get together with a theatre owner and fix the terms on which he shall exhibit their pictures, but at the same time, they make restrictive agreements which determine the terms on which that theatre owner's competitor may exhibit the film, and that those are the restrictions which bring them into conflict with the law, and that even if they do not agree with another distributor to impose restrictions of that character, if it appears from the restriction, from the nature of the restrictions themselves, that they were imposed for the purpose of preventing this subsequent exhibitor from com- (587)

peting on fair terms with the owner of the first run, that then there is an unlawful combination right then and there between the distributor and that prior run exhibitor with whom he makes the agreement that restricts the terms on which he shall do business with the subsequent run.

Judge Goddard: Mr. Wright, in the absence of combination, is clearance illegal? Have you changed your position?

Mr. Wright: No, I was just stating that we do not make any claim of illegality in the absence of combination, but we differ as to who may be parties to the combination. We say you can have an illegal combination—

Judge Goddard: You still contend that clearance is essential, providing it is reasonable as to time and area? If you can give me a direct answer to that it will help me, please.

Mr. Wright: We are not here, if the Court please, to determine the facts as to what is essential or what is not essential to any particular form of exploitation of the market. I think what we are here for is to determine what is legal and what is illegal. It is perfectly true that if you are going to have a system of staggered runs and clearances, you have to have clearance agreements, but in our view you do not need the network of restrictions that you have got (588)

now in order to have a market in which you have some clear-

ance restrictions; that you cannot have clearance restrictions and at the same time have a competitive market, a market in which clearances are freely negotiated, which we say you haven't got now.

Judge Hand: Mr. Wright, when you read over those minutes I think you will come to the conclusion you did not give a very direct answer.

Judge Bright: Could you be more concrete?

Mr. Wright: Let me give a concrete example of the circumstances under which I think you could say that clearance restrictions are reasonable. If, for example, you have a situation where you say you want—it is publicly desirable, let us say, to have the film shown in the same area at staggered admission prices, beginning at 50 cents and going down to 10 cents—

Judge Hand: I do not know what you mean by desirable. Desirable to whom?

Mr. Wright: To the public, let us say.

Judge Hand: I know, but the public has no right. Now, the public has no desire.

Mr. Wright: Desire to the distributor. Let us assume that a distributor, exploiting a particular market—

Judge Hand: You are talking about the matter as though the law had some control over what a copyright (589)

owner charged for a license. It has no—

Mr. Wright: It has no control over what he charges for a license fee. The Sherman Act does modify the copyright law to the extent that it does impose limitations on the kind of restriction agreements he can make with the persons to whom he grants licenses.

Judge Hand: Yes, because of the effect upon third parties—

Mr. Wright: Yes.

Judge Hand: (Continuing)—and through combinations.

Mr. Wright: Yes, that is correct.

Judge Hand: It makes no difference, in other words, how desirable or undesirable it is to the public in the par-

ticular case, if these other factors are not involved, to have a cheap film or not. The public has no right to have a cheap film.

Mr. Wright: The only rights that the Sherman Act guarantees the public, as I see it, is to have a competitive distribution of films.

Judge Hand: That is true.

Mr. Wright: And that, of course, is the issue that is raised here, whether there is a free competitive market or whether the market is arbitrarily controlled by combination among these defendants in the suit.

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Mr. Davis: If the Court please, I rise to call the first witness. I haven't taken part in this discussion this morning, although I have found it extremely interesting, but there is one thing I want to say before I call my witness: The stubborn refusal of the Government to state its position in this case, and I use that word advisedly, the stubborn refusal to state its position is only equalled by the equally stubborn misrepresentation of the position of the defendants. I was astounded when my friend said that the defendants contended that a copyright owner was privileged to make any contract he pleased, and that that was our position. Now, of course, no such position has ever been maintained by any counsel in this case, and, I hope, by no informed counsel in any other.

There are two guiding principles here, and I suggest them and then I am going on to what is my immediate duty. I think you will find the cases fall into this partition: The owner of a patent or of a copyright monopoly is supreme within the borders of his grant, and whenever he oversteps the borders of his grant and seeks the use of monopoly to grasp upon it a monopoly outside of his grant, the action is illegal; and, second, that so long as he stays within the borders of his grant, he may use any means not forbidden by law to reap the reward of his monopoly which the grant promises to him.

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That is the acid test in all these cases and I do not think you will find any decision which challenges either one of those principles. That is our position here, and we maintain that we have, in these contracts and in our conduct, stayed strictly within the limits of our copyright grant and that the means we have taken to reap our reward are not forbidden by any law of the United States.

Having said so much, because I did not want this debate to go on without my participation, having said so much, I want now to call the first witness for the defendants.

It has been agreed that we will put our cases in, our full cases, in the rotation we have previously observed. I have a witness on behalf of Loew's, Inc., whom I want to examine on some general subjects which will interest all the defendants alike. Therefore, we have arranged that I shall call my witness and examine him. I will then modestly retire, without closing the case on behalf of Loew's, Inc. and my brother Seymour will take the field for the Paramount.

I call Mr. William F. Rodgers.

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WILLIAM F. RODGERS, called as a witness on behalf of the defendant Loew's, being first duly sworn, testified as follows:

Direct Examination by Mr. Davis:

Q. Where do you live, Mr. Rodgers? A. in Rye, New York.

Q. What is your occupation? A. I am general sales manager and the vice-president of Loew's Inc.

Q. What are your duties as the general sales manager of Loew's, Inc.? A. General supervision of all license agreements, and the operation of our branch offices throughout the United States and Canada.

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Q. Do you have anything to do with the management of theatres? A. No, sir.

Q. Do you have anything to do with the purchase of films for exhibition in their theatres? A. No, sir.

Q. How long have you been in the motion picture business? A. Thirty-five years.

Q. Will you give us a brief summary of the experience you have had in the motion picture business? A. Well, I was employed in 1910 by the General Film Company, and several years later I left to go with a Mutual Film Corporation, and in both capacities I was more or less employed as a clerk. I later came back to the General Film Company as a branch manager, in Albany, I believe.

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For a short period of time I was also with the Triangle Film Corporation, and again in, I should say 1915 or 1916, in that neighborhood, I returned to the General Film Company as sales manager of the company, and in 1918 I went with the Goldwyn Company.

During a period of 1917 and 1918 I was away from there and for a short period of time I worked on special duties for Famous Players-Lasky, and returned to the Goldwyn Company in 1920, and I have been there ever since, that is, the Goldwyn Company merged with Métro in 1924, but with either one of the two companies, I have been continuously employed since 1920.

Q. That makes a total span of how many years? A. Thirty-five.

Q. In short, you practically grew up with the business, I take it? A. That is right, I have had a great deal of experience.

Q. We have used a great many terms here which I think all of us understand, but I want to have definitions of them on the record, so I will begin with definitions. What is a

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feature film? A. We consider a feature film as a subject that is in excess of 4000 feet.

Q. Regardless of topic? A. Regardless of topic, would be considered a feature subject.

Q. What is a short? A. A short subject is 2000 feet or (594)

less, as a general thing. In some cases they have made what they call streamlined features, from 4000 or less, but we confine a short subject to, generally speaking, 2000 feet or less.

Q. What is a newsreel? A. A newsreel is a subject dealing with topical subjects of the day and, generally speaking, is less than a thousand feet in length.

Q. What is a trailer? A. A trailer is a method that is used in advertising advance entertainment. Some people refer to it as "Coming Attractions." It is a film that is shown on the screen indicating the future entertainment of that particular theatre.

Q. They come on the screen as "Next week so-and-so"? A. That's it.

Q. And it has a scene or two? A. Sometimes; sometimes it is entirely in text.

Q. They are used purely for advertising purposes? A. Advertising purposes.

Q. Rather than for exhibition? A. Yes.

Q. What do you mean by general release? A. General release is a period of time when a picture is generally available to the more important places to commence its exhibition.

Q. Who fixes the time of the general release? A. In my company, I do.

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Q. What is a trade showing? A. A trade showing is the result of the consent decree, in that we trade-show for the benefit of our customers each picture before it is offered to be licensed.

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Judge Bright: Features?

The Witness: Each feature picture; not the short subjects.

Q. What is a road show? A. A road show is generally considered a picture that has the majority of seats scaled at a dollar and ten, or a dollar and twenty cents or better at night, for adult prices.

Q. What is meant by "preferred time"? A. Well, preferred time is the days of the week where the theatre most generally does the greatest business.

Q. What are those days? A. They differ in different parts of the country and differ in different cities and differ in different neighborhoods. Sometimes Monday and Sunday are better; other times Friday and Saturday are. It depends entirely on the locality.

Q. And the habits of the people? A. And the habits of the people.

Q. What is meant by a test run? A. A test run is in an effort to determine a fair exhibition value from a distributors' viewpoint of a particular picture. We test them in a number of cities before we are in a position to determine (596)
the extent of drawing power.

Q. What is meant by a franchise? A. Generally speaking, a franchise is intended to cover an agreement for a period of longer than a year.

Q. What is meant by a blanket deal? A. Generally speaking, again, a blanket deal is considered one that embraces a number of theatres on one form of contract.

Q. Consolidate the revenues for the purpose of fixing price? A. Well, it consolidates revenues in a good many theatres. Of course, it isn't always for all the theatres involved. Sometimes it is only for a given number of theatres involved.

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Q. Will you tell us just what the machinery is by which you make a sale of these, or license of these films? A. Would you like me to give you the general organization and structure of our company?

Q. Yes, general organization and structure. A. Well, we have, first, of course, our main offices here in New York, and we have 32 branch offices or exchanges, as we call them, in the more important cities in the United States, and in those offices we employ a branch manager, assistant manager, an office manager, a number of clerks, number of shipping clerks, people to inspect film, exploitation men, and salesmen; and each three or four of those offices are under the supervision of a district manager; and each four or (597)

seven of those offices is under the supervision of a sales manager. Our sales managers, with the exception of the one in New York City who supervises New York, make their headquarters in the field. For instance, our West Coast sales manager makes his headquarters in Los Angeles; we have one in the South who makes his headquarters in New Orleans, and another one in Pittsburgh who makes his headquarters there and supervises the adjacent area; another one in Chicago and so forth.

When our films are trade-shown our salesmen are routed to various sections of the individual area, in which office they represent, and they contact the theatre owners in that area for the purpose of securing license agreements.

Our district managers, plus our branch managers, solicit the business of people who we call office accounts. Those, generally speaking, are those located in the larger cities or more important accounts of the particular office; and if the assistant or the sales manager is needed, he also participates in the negotiations and representation of our product.

And those contracts or license agreements, when they are completed, are forwarded to New York for approval or rejection.

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tion. There aren't, however, many rejections. They usually are accepted on the basis of the field man's recommendations. (598)

Q. Does all this organization act under your instructions? A. Yes.

Q. And report to you? A. And report to me.

Q. How are the films made available to the exhibitor?

A. Well, that depends largely on the locality of the exhibitor, the type of theatre he has, where he is located, and his ability to pay. I said his locality, but we try, in so far as it is practicable, to negotiate what we call first runs, second runs, third runs, and so forth, in the order of their importance.

Q. I am coming to that in a moment. What I was really after was the distribution of prints and their rotation? A. The distribution of prints, of course, is one that is handled by a booking clerk. We have a number of booking clerks in our offices who supply the prints, the positive prints, that is, to the theatres with whom we have license agreements, depending upon the availability of the picture to that particular theatre.

Q. How many prints, exhibition prints, are made of each feature picture? A. That depends entirely upon the picture. We have some of which we ordered as low as 200 prints; and on some pictures, such as *Gone With the Wind*, we have ordered as high as five hundred. I should say, generally speaking, a fair average for our company is 300, 350.

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Q. Are they delivered from the exchange to the exhibitor? A. Yes, sir.

Q. And then returned by the exhibitor to the exchange?

A. At the completion of their engagement, for examination.

Q. And then after examination they are returned, and they are delivered to some other exhibitor? A. Booked to another theatre.

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Q. So that a number of films rotate throughout your entire sales area? A. Yes, sir.

Q. You spoke of runs. What are runs? A. Well, runs—

Q. In the language of the trade? A. Sir? I did not hear that.

Q. What are runs in the trade language? A. Runs is a sequence with which the positive prints are delivered. A run is either a prior period to another theatre or a subsequent period to another theatre. The whole run of the picture is the sequence with which the positive print is supplied.

Q. How are runs classified? A. Generally speaking, according to the ability of a theatre to pay, its locality; number of matters are taken into consideration. I will get to that in a moment. There are first runs, second runs, third runs, fourth runs; how many more? A. Sometimes they go up to 18 or 20, depending again on the size of the city. I couldn't tell you offhand how many runs are involved in the (600)

metropolitan area here in New York, but I should venture the suggestion there are at least twenty or twenty-five runs.

Q. During the period of first-run, does any other theatre show the picture? A. Generally speaking, not in that particular city, no, sir.

Q. The same is true as to the second-run, no later runs show the picture in that locality? A. Later runs do not show the picture in the particular city while the second runs are playing.

Q. How many theatres does one positive reel of film serve in the course of the season? A. One print of a positive subject, it depends—you cannot do that by a general rule. It depends entirely on the territory. Take, for instance, in Texas, we can get many more runs for a picture because they are shown less frequently and the wear and tear is less great. In New York, where there are theatres which open early in the morning and play until early the next morning,

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with the consequent wear and tear, the call for stock is much more acute; you do not get as many runs in New York. I haven't, frankly, averaged it for some little time, but the last time I did I think we got on the average of 35 runs, 35, 40 runs for a picture.

Q. What is the cost of such a positive film, the cost of making them, not the cost of production? A. That again (601) depends on whether it is black and white or if it is in technicolor.

Judge Bright: By 35 runs, you mean 35 exhibitions?

The Witness: No, I would say 35 runs. Sometimes a theatre in New York, for instance, may run eight or ten times a day and run it for four days; but I consider myself if a theatre plays our picture three days, I consider that one run. So on the average of 35 engagements, I might say.

Q. I was asking you the cost of making one of these films?

A. The cost depends on black and white or technicolor. If you order all prints that are required, or generally all that you need, the positive print of black and white approximates about a cent and a half a foot, whereas, in the case of Technicolor, it is approximately $5\frac{1}{2}$ cents or five and a fraction a foot.

Q. Do you negotiate with your theatres the run which they are contracting to play? A. Either I or one or my immediate assistants do.

Q. Is that reached as a result of agreement? A. No, we generally discuss each individual theatre alone, individually, wherever it is located, except I may decide to renew an agreement that had been going on for the last six months or a year, and I will say, "Let us do the same way for the future," but, generally speaking, each theatre is considered separately.

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Q. I mean, is the particular run the subject of final agreement between the exhibitor and yourself as the sales agency?

A. Yes.

Q. Do you determine, you or your organization determine, what you are prepared to offer to the exhibitor? A. That is, our theatres in our company, you mean, or generally speaking?

Q. Yes, in your company. A. In my company I am the one that determines that in negotiation with our theatre people.

Q. Why is this system of runs necessary in the industry? A. As I have viewed it over a good many years, it is the only basis on which you can afford to invest the tremendous sums that today are invested, and have been for many years, in motion picture production. There must be a priority of run, otherwise, if pictures were shown simultaneously, such as they were many, many years ago, there would be no possibility of grossing the large amount of money that is necessary to gross today to warrant the investment that is made in our pictures.

Q. Why should that be so? A. Well, in the first place, there are many, many communities who cannot afford to charge an admission price such as the admission price that is charged by the larger theatres, and in the days when all theatres charged very, very modest sums and pictures were

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shown simultaneously in all different types of theatres, you did not gross as much per picture in those days, as a result of those matters, as you now spend for a matter of footage in the production of pictures. In other words, I remember some of the most successful short subjects that were made, many, many years ago, that grossed in those days, and we thought was very great, \$20,000 a picture. Well, \$20,000 for a picture today would not hardly give you time to turn

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around. And that sort of thing was abandoned many, many years ago, because, with the increase of the cost of production, it was necessary to seek other means, other avenues of return, to justify that cost, cost of ever increasing demand for better stories, better writers and everything else that goes to make up production, and from that developed the runs.

Q. When was the practice of runs started? A. Runs with priority over each other, or one subsequent to another, I should say, must have started in the neighborhood of twenty—some twenty-four, twenty-five years ago—23, somewhere in that neighborhood.

Q. Have they been continuously employed since that time? A. Yes, sir.

Q. I asked you the reason for adopting this system of runs. Has the habit of the public anything to do with it? A. Well, the habit of the public has this much to do with it. (604)

As I say, first, they live in neighborhoods many of which could not support a theatre that charges as much as the downtown or larger theatres. Then, in addition to that, the public, if all runs were shown at the same time, would miss a picture that they were particularly interested in and it would be gone, whereas today there is a staggered number of runs and if a person missed a picture in one particular theatre, he can usually find it in another for a good long time to come. And then again it would be impossible, practically, to supply any larger number of runs simultaneously.

Q. Is there anything in the eagerness of human nature to see a thing first? A. Very definitely.

Q. There are people who will pay money for that privilege, aren't there? A. There are.

Q. What are the factors that dictate the selection of theatre A for a first-run or theatre B for a second, or theatre C for a third? A. There are a great many factors that have

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to do with that. There is locality, management, showmanship-ability, location, their price of admission, length of run—there are so many, many factors you take into consideration.

Q. I want to read to you from the consent decree, Section 10, Paragraph C, and ask you to follow this closely. This section provides that "In determining whether the exhibitor's (605)

complaint"—that is, as to a run—"is established by the evidence, the arbitrator shall take into consideration, among other things, the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed: the terms, if any, offered in respect of each of the two competing theatres; the seating capacity of each said theatres; the capacity of each for producing revenue for the distributors; the character, appearance and condition of each, including its furnishings, equipment and conveniences; the location of each of said theatres; the character and extent of the area and population each serves; the competitive conditions in the area in which they are located; their comparative suitability for exhibition of the distributor's features and the run requested; the character and ability of the exhibitor operating each and his reputation generally in the industry and in the community for showmanship, honesty and fair dealing; the policy under which each of the theatres has been operated and the policy under which the complainant proposes to operate his said theatre if he obtains the run requested; the financial responsibility of the exhibitor operating each of said theatres, and the distributor's prior relations with each of the two theatres involved and with their owners and operators and any equities arising therefrom."

Do you consider all these factors in deciding a run? A. I certainly do, but I think that is a very, very proper way to consider it, too.

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Q. Are there any others that occur to you which are omitted from that catalog? A. I don't remember.

Q. I notice the last thing in that catalog of factors is the distributor's prior relations with each of the two theatres involved. How does that enter into the subject? A. From our point of view that enters into it with me very strongly.

Q. How so? A. Well, we have had many, many years in which to finally determine on the best runs for our product and the best outlets for our pictures. We have given all these matters due and careful consideration that you have cited there, and when a man who has been dealing with us for a period of years qualifies under all of those, I see no reason for considering changing him. And therefore the man who has been a customer of ours for a period of years has a very good standing in our eyes.

Q. Do you negotiate this question of runs theatre by theatre? A. Our company does, yes, sir. Our representatives, rather.

Q. Do you negotiate with theatres owned by any of the co-defendants in this case? A. Yes, sir.

Q. Do you apply to the theatres owned by your co-defendants, or by the co-defendants at bar—do you apply the same criteria that you do to theatres owned by independents? A. Yes, sir.

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Mr. Wright: If the Court please, I think that question calls for a conclusion that the Court rather than the witness would find from testimony as to what was actually done in those situations. I do not think it is proper for this witness to make the statement in that form.

Judge Hand: Overruled.

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Mr. Davis: Will you read the question and answer?

(Question and answer read.)

Q. Do you give any preference to any theatres owned by the co-defendants because of their ownership? A. No, sir.

Mr. Wright: Same objection.

Q. Do you have any agreement, contract, understanding or concert of action with the defendants, the co-defendants, or any of their officers or agents with reference to the runs that should be given to any particular theatre? A. No, sir.

Q. Is that an entirely independent determination on your part and on the part of your company? A. Entirely on my part.

Q. What is clearance? A. Well, clearance is linked up very closely with the matter of runs. There are some places where the sale of the run suffices; whereas in other cases the matter is defined as clearance, and sometimes they are used together. Clearance is the period of time elapsing between one showing and another, or one engagement and another, I should say. Sometimes it is measured from the (608)

last exhibition day of a prior run. Some specific period, depending upon the individual situation involved.

Q. What is the reason for it? A. Well, the reason has been established, again over very many years. Generally speaking, clearance for a certain period is given to a theatre who plays prior and is in a position to pay greater returns to the distributor than the succeeding runs. Therefore it is felt by us as a distributor that he should be given a certain amount of priority. That priority differs, depending entirely on the situation involved or the locality involved, I might say. It runs from six days to three months, depends

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entirely on the theatre and its location, its operation, and all of those other elements that you have just recently read.

Q. Why should it be a matter of importance, the exhibitor holding the first-run, that the second-run should not begin for a specific period after his run was ended? A. Well, if you did not give a reasonable period of time, that second-run house would be advertising the product while the first-run house is playing it. In addition, the run that followed the second-run house would be advertising the picture before the second-run played it or while he was playing it; and as you go down in the sequence of runs, each theatre has the period of time, or each group of theatres sometimes has the (609)

period of time elapsing between one showing and another; and only in that way are you able to handle their collective business with the limited number of prints that you can afford to buy.

Q. How long has that system of clearance been in use?

A. For approximately the same period of time that the runs have been in use, 20 to 25 years.

Q. Well, do you and your organization determine the amount of clearance to which your customer theatres are entitled? A. Yes, that is determined by us but is brought about by negotiation and the consideration of a great many elements. Again, the type of theatres and a great many other things.

Q. Well, let me read you again from paragraph 8 of the Consent Decree, and I will ask you to follow this closely:

"In determining whether any clearance complained of is unreasonable, the Arbitrator shall take into consideration the following factors and accord to them the importance and weight to which each is entitled, regardless of the order in which they are listed:

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"(1) The historical development of clearance in the particular area wherein the theatres involved are located;

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"(2) The admission prices of the theatres involved;

"(3) The character and location of the theatres involved, including size, type of entertainment, appointments, transit facilities, etc.;

"(4) The policy of operation of the theatres involved, such as the showing of double features, gift nights, give-aways, premiums, cut-rate tickets, lotteries, etc.;

"(5) The rental terms and license fees paid by the theatres involved and the revenues derived by the distributor defendant from such theatres;

"(6) The extent to which the theatres involved compete with each other for patronage; and

"(7) All other business considerations, except that the Arbitrator shall disregard the fact that a theatre involved is affiliated with a distributor or with a circuit of theatres."

Do you consider those factors in determining upon clearances? A. They were considered in determining clearance.

Q. Are there any others which occur to which are not included in that list? A. I could not recall any at the moment, no, sir.

Q. Do you, in fixing clearance, disregard the fact that

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the theatre involved is affiliated with one of these co-defendants or with a circuit of theatres? A. I do, yes, sir.

Q. Is that negotiated theatre by theatre? A. Theatre by theatre.

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Q. And on the merits of the particular theatre involved?

A. And on the merits of that particular theatre. In fact, all of our negotiations are by individual theatres.

Q. Is there any agreement, or has there been any agreement between yourself, your organization, or Loew's, Inc. with any of the defendants in this case as to the time or place of clearance, or the grant itself of clearance to any particular theatre? A. No, sir.

Mr. Wright: If the Court please, that calls for a conclusion that can only be drawn from the evidence in the case as to what was done in these situations, what these agreements are. I do not think this witness is competent to give that answer.

Judge Hand: Overruled.

Q. Now I come to contracts, Mr. Rodgers: You told us what franchises are. A. Yes.

Q. Are there any franchises outstanding between Loew's Inc. and any exhibitor? A. No, sir.

Q. Has Loew's ever indulged in granting franchises? A. Yes, sir, but not lately.

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Q. Can you tell me in its entire history how many franchises Loew's has granted, how many to the defendants or corporations affiliated with them, and how many to independent exhibitors? A. Well, I had that record prepared a short time ago. I believe altogether—

Q. I will let you refresh your memory. You say that was prepared by your direction? A. Yes.

Judge Bright: What did you say a franchise was?

The Witness: A franchise was an agreement to supply the product for a period longer than one year, usually two years or longer.

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A. (Continuing) Well, we had had franchise agreements with those who are affiliated with the defendants, a total of 46 for less than five years, during the history of our company; with six that we had made for a period of ten years; and seven we had made for five years, or a total of 59 such franchises. And to the individuals or so-called independents during a similar period we had granted 154 franchises. In other words, a total of 213 of which those associated with the defendants had 59.

Q. And all those have now expired? A. They are all expired.

Q. Are you granting franchises currently? A. No, sir.

Q. Why not? A. Well, the consent decree prohibits it.

Q. Well, explain just how and why the consent decree (613)

prohibited franchises? A. Well, I might add to that the consent decree did prohibit it: Whether it does or not at the moment, I am not prepared to say definitely, but we have respected the terms of the consent decree which require us to trade show each picture before it was offered to be licensed. So, therefore, for the most part we are offering to license to theatres but four and five pictures at a time because that is as many as we can get together at one time.

Q. Well, the franchise is a contract entered into before the pictures are made? A. Yes.

Q. And cover the output or a portion of it for a certain future period? A. Generally speaking, the output for a period.

Q. So if you trade show, of course you can't contract for pictures that are not yet in being? A. Yes, sir.

Q. Now, franchises aside, what is your other form of contract? A. We have a form that we call license agreement which applies to each group of pictures as they are offered; or if we sell an individual picture, it applies to that. And as I say, generally speaking, they are now offered either individually or in groups of four or five pictures at a time.

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Judge Hand: Why do you offer them in groups of four or five? I suppose you do not offer more perhaps because of the provisions of that decree?

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The Witness: Well, I must show them first, and I can't get more than four or five together, as a general thing, to trade-show, and therefore I am limited in the number of pictures I can sell.

Judge Bright: Well, you are limited to five anyway, aren't you?

The Witness: Well, we were limited to five, but to be frank with you, I think that there was some misinterpretation that we always felt we were limited to the number that we could show; so therefore, for my company, when we were in a position once or twice to show 10 or 12, we offered the 10 or 12, but after they were trade-shown we gave a cancellation privilege on those.

Judge Hand: This is all a mystery to me. Why do you have four or five instead of one?

The Witness: Well, to be frank with you, that is more for our customers' convenience; and so many theatres play so many pictures, that it is very difficult for them to buy small quantities at once. They would rather buy larger quantities.

Q. Why? A. Well, in the first place they seem to think, I believe, that they can buy them cheaper, No. 1; and secondly, and of equal importance, is that it permits them to have a sort of a sense of security; if they would have a year's

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product at one time it would relieve them of the necessity for buying each month or each two months.

Q. Well, if they get a group of five, do they like to buy them in groups in order to secure certain exhibition time

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for their theatres? A. Well, they don't care particularly about buying them in groups, but they would certainly rather buy five than they would one, because the transaction would be just multiplied five times, and they must make their bookings in advance, and they like to set their bookings as far as they can. So the theatre owner would rather buy in the larger group.

Q. I show you what purports to be an exhibition contract, Metro-Goldwyn-Mayer Pictures, distributed by Loew's, Inc., form No. 1221-15M-3-45, and ask you whether this is the current form of contract license that you are employing? A. Yes, sir, that is the current form of contract form that we are using at the present time.

Mr. Davis: I offer that in evidence. I think that will be Loew's Exhibit 1, will it not?

Mr. Wright: We have no objection, but if there are any differences of substance between this form and the one we offered for the 1943-44 season, I think they ought to be pointed out.

Mr. Davis: I am not sure whether there are any or not. I have not compared them. The shorter is somewhat abbreviated, and I do not accept the sum-

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mary which is in your exhibits.

Mr. Wright: May we have copies?

Mr. Davis: They are all copies.

Q. Why this different coloring, Mr. Rodgers, on these?

A. They all go to different departments. One copy after it is approved goes to a sales manager, possibly; another one goes to a district manager; one goes back to the branch; and, of course, the theatre owner must get his copy, and that is the reason they are all different colors.

Judge Bright: Are they all identical?

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The Witness: They are all identical, yes, sir.

Mr. Davis: I shall ask to have the white one marked in evidence, as I want to ask some questions about it, and perhaps your Honor's would be content with a pink, a yellow and a green.

(Marked Defendant Loew's Exhibit L-1)

Q. I notice on this exhibit, Mr. Rodgers, a series of squares marked "Top Bracket", "2nd Bracket", "3rd Bracket", "4th Bracket" and "5th Bracket." What is the meaning of those? A. Well, in those spaces are inserted at the conclusion of negotiations the prices that had been agreed upon to be charged for pictures that would be designated in any one of five brackets. We classify our pictures in five different brackets.

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Q. You classify them from what point of view? A. From their ability to draw at the box office, which is determined after our test runs.

Q. Are you always right about it in your classification?

A. No, sir. We sometimes err, not often.

Q. Does the bracket in which the picture is entered have anything to do with the price you charged for it? A. Yes, sir; we charged that price that is in that bracket. If we designate a picture in the second bracket, that is the price that is charged as film rental, or the terms that are charged.

Q. What do you do if it proves that your prophecy was wrong and the picture does not belong in as good a bracket as you gave it? A. We move it into the bracket where it does belong, immediately.

Q. On your own motion or on an application of the exhibitor? A. On our own motion when we know it; but when we don't know what the receipts were, an application on the part of the exhibitor will straighten it out immediately.

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Q. Now, I notice to the right of this exhibit what is called a sliding scale table. Will you explain that to me?

A. Well, a sliding scale is a percentage arrangement whereby our percentage of the gross receipts in that particular theatre is measured by the amount of business that the (618)

theatre does. We will agree with the theatre owner to start off at a certain figure, and before we can earn any more money the gross receipts must increase, and as they increase our percentage of the gross increases.

Q. I was a little ahead of my story. You have license fee or rental or minimum guarantee; you also have license fee, percentage of all gross receipts. Which of those methods, or both, do you employ? A. We employ them both. As a matter of fact, we have no fixed policy. We have a very flexible policy. We prefer to play on a sliding scale. If that does not suit the pleasure or convenience of our customer, we will play on a guarantee with the sharing arrangement, or in some instances we will even play on a flat rental if we can get enough.

Q. What proportion of your contracts are on a percentage of gross receipts? A. Well, that would be pretty hard to answer unless you call for specific pictures. I would say there are some pictures in which we have a participating arrangement with every theatre we do business with, without exception; and there are other instances where I would say the smallest percentage of theatres play flat rental. The largest percentage will have some kind of a participating arrangement.

Q. What is the reason for playing some pictures flat rental and others on percentage? A. Well, for the most (619)

part the most successful pictures are those which cost the most; and I have never found it possible to get in the way of a flat rental a sufficient price that would assure me of

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having at least an opportunity to handle the picture profitably. But by handling it on percentage, we have an opportunity to share if the picture develops that particular type of gross; and then, in addition to that, we have a chance to profit if the gross receipts so justify.

Q. Is there any advantage to the exhibitor in fixing compensation on a percentage rather than a flat rental basis?

A. I think there is a very definite advantage to the exhibitor.

Q. What? A. Well, in other words, he pays what he figures to be a fair proportion of receipts if the picture develops. In our sliding scale it is most advantageous to the theatre to play on that basis because he rarely, if ever, can be hurt under such arrangement. He buys pictures at a minimum percentage term and does not increase them unless the gross receipts of the theatre are materially increased; so it is particularly to his advantage.

Q. Now, I find on this exhibit in red ink a special offering of a picture called "Weekend at the Waldorf." How does the offering of that picture differ from the five that are in the group named at the top of the exhibit? A. That is (620)

one where we want participating arrangements everywhere, and that is sold independent from the group entirely. It is not necessary for them to buy it in order to get the group, nor is it necessary for them to buy the group in order to get that one.

By Judge Bright:

Q. There is some reason for that, isn't there? A. You mean both in the same contract?

Q. Some reason for putting "Weekend at the Waldorf" in red ink. A. Well, the reason for that is, again, respecting the consent decree or its provisions. This was a special picture on which we wanted participating arrangements, and I wanted specifically to call to the attention of the trade, and

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for Mr. Wright's information if it fell into his hands, that we would not use an individual picture to sell a group, nor were we using the group to sell an individual picture. Each had to stand on its own merit. And the reason I put them in the same sheet—this was made up several months ago, this contract, four or five months ago—was at that time in an effort to conserve paper. Otherwise I would have had two separate contracts. That is the reason for it being in red ink.

Q. Was the reason because of the fact that this particular picture is shown in Radio City? A. It had not been (621)

contracted for at that time in Radio City when this contract was made up, but I knew it would be contracted for specially, and it deserved unusual terms.

By Mr. Davis:

Q. Who prepares this form of contract? A. Well, I supervise it. It is done in our office here in New York by various associates of mine, but the authorship of that particular arrangement, I suppose, is mine.

Q. Do you, or has any officer of your company, any agreement, contract or understanding with the co-defendants or any of their agencies for the employment of a common form of contract? A. No, sir.

Q. Has there ever been any such agreement so far as you know? A. Not for many, many years, not since Judge Thatcher's decision, no sir. There was a uniform contract at that time.

Q. It did exist, did it not, prior to 1928 in the trade conference era? A. Yes, in which exhibitors and distributors participated, but not since that time.

Q. And they participated in the trade conference under the aegis of the Federal Trade Commission, isn't that so?

A. I believe so, yes.

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Q. Since that time there has been no agreement on uniformity? A. None whatever.

Q. Now, I notice a line on this exhibit "Net Admission (622)

Prices Per Person—Orchestra—Balcony—Children under 12—Matinee—Evening—Adults and Children of 12 and over."

What is written into that when the contract is complete? A. Well, inserted there are the admission prices that the theatre owners give us as their minimum prices for each particular period of the day, or the division, as you cite, between adults and children. That is the prevailing price, the minimum price that the exhibitor is charging at the time that agreement is negotiated.

Q. Do you fix that minimum or does the exhibitor fix that? A. Oh, no, I do not fix that. The exhibitor fixes that. That is his price.

Q. He prices the theatre and his admissions and you write it in accordingly? A. Yes, sir.

Q. Has he the power to increase such price if he wants to? A. Yes, indeed he has.

Q. Does that occur from time to time? A. I am sure that it does; a number of instances.

Q. Have you looked up that question with particular reference to the film "As Thousands Cheer" to ascertain how many theatres exceeded their minimum admission? A. I could not tell you, but I am sure it must be hundreds.

Q. Well, I show you a memorandum and ask if that refreshes your recollection. How many theatres showed "As (623)

Thousands Cheer" (handing paper)? A. I believe in the neighborhood of fifteen-thousand-some-hundred theatres.

Q. How many first-run? A. Well, I have not segregated it by first-run, Mr. Davis. I could not tell you how many first-run. That has always been a difficult question for me to define, how many first-runs are there really.

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Q. Well, we will have something more on that later. I am asking you now by way of illustration in how many cases did the exhibitors exceed their minimum prices? A. 346 cases of the number of contracts that we had of record; it was 346 cases that increased their admission prices.

Q. Out of how much? Let me see that memorandum a moment. A. Out of an examination of 3600 theatres.

Q. Yes. These figures are taken, are they not, from those of the 416 cities with more than 25,000 population? A. Yes, sir.

Q. Showing 3631 theatres? A. That is correct.

Q. And among those theatres you have reports of admission prices of 3237? A. Yes.

Q. And in 346 of that latter number they exceeded the admission price? A. Than had been provided for in the contract, yes, sir.

Q. How many such license contracts are made by Loew's, Inc. in the course of a season? A. Well, we do business (624)

and we sell approximately—well, we sell as low as 7000 contracts and as high as fifteen-thousand-some-hundred.

Q. How many theatres are there in the United States? A. Approximately 17,000.

Q. Well, while we are on that, what is the Film Daily Year Book? A. The Film Daily Year Book is a publication that is issued once a year by the publishers of the Film Daily.

Q. Is it regarded as a reliable publication? A. Yes, sir.

Q. Is it a current reference book in the trade? A. Yes, for very many topics.

Mr. Davis: Well, I should like to offer as an exhibit a reprint of pages 7 and 8 of the Government's trial brief with an added column of the number of theatres taken from the Film Daily Year Book. I offer that in evidence.

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Mr. Seymour: Of course, I assume that for the most part these exhibits offered by individual defendants are not exhibits as against their co-defendants. I do not make any objection to this. The exhibits will have individual numbers; they are offered in support of the individual defense of the case.

Mr. Davis: I can assure you that I have no malicious purpose toward any of my co-defendants. Indeed, if any of them told me that this exhibit was in
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any respect harmful, I would not offer it. Just so much concert of action in this case.

Mr. Proskauer: I desire to embrace the offer of concert. This exhibit can certainly be offered on my behalf.

Mr. Wright: I do not think we have any objection to the exhibit as such. I might say we don't have the same confidence Mr. Davis has as to the reliability of the Film Daily figures. Our experience is that many are not accurate.

Mr. Davis: I have proved that that is a recognized and respectable publication.

Mr. Wright: For the purposes of this exhibit the figures there seem to be roughly correct.

Mr. Davis: I offer that in evidence.

Judge Hand: Received.

(Marked Defendant Loew's Exhibit L-2)

Mr. Davis: Your Honors will notice that it raises the previous estimates of the theatres in the United States to 18,076.

By Mr. Davis:

Q. I believe you said, Mr. Witness, that you had nothing to do with buying films for exhibition in the Loew theatres? A. That is correct, I do not.

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Q. Did you mean to include films which Loew's itself (626)

producers in that statement? A. Well, even in that position, I am a seller to Loew's theatres, not the buyer for them.

Q. Do you have to negotiate with the Loew's theatres as if you were a stranger? A. Yes, sir.

Q. Who is on the buying end of that proposition? A. There are two gentlemen, Mr. Joseph Vogel and Mr. Charles Moscovitz.

Q. They each have an organization, I suppose, to assist them in buying? A. Yes, sir.

Q. And you sell your Loew's pictures to them as if you were selling to a stranger? A. Yes, sir.

Q. Do you find them hard traders? A. Sometimes.

Q. Do you in selling your pictures to Loew's theatres inquire what pictures Loew's are buying from other producers? A. No, sir.

Q. Do you in negotiating your contracts with third parties or with the co-defendants pay any attention to what they are buying from Loew's? A. No, sir.

Q. I mean what they are selling to Loew's. Of course you would pay attention to what they are buying if you are selling to them. A. Oh yes.

Q. But do you pay any attention to what they are buying from others? A. I have no interest in that.

Q. Do you make the licensing of a film to a theatre (627)

affiliated with any of the co-defendants dependent as to price, terms or duration on what that co-defendant may be licensing to you? A. No, sir.

Mr. Wright: If the Court please, that again calls for a conclusion that I do not think he is competent to draw.

William F. Rodgers—By Defendant—Direct

Judge Bright: Is all of this licensing throughout the United States cleared through your office?

The Witness: Yes, sir.

Q. Could you tell me how many such contracts as this I have just exhibited are executed in the course of a season?

A. Well, for an individual picture I should say we execute as many as fifteen-thousand-some-hundred agreements, and in a group of pictures probably the same number, but cancellation privileges would bring it down to eighty-some hundred or seventy-five hundred, or maybe lower.

Q. How many such groups do you sell in the course of a season? A. Well, last year we had about 30 pictures of which about a half dozen were sold separately. We must have had six groups, at least, and six individual sales, a terrific amount of transactions.

Q. Well, my mental arithmetic is not good enough. How many separate contracts would that add up to? A. If I had six groups of 15,000, that would be 90,000; and if I had six more individual sales, approximately, that would be (628)

another 90,000, or 180,000 transactions on those alone, on feature attractions alone.

Q. That is pretty astronomic. A. Yes; and don't forget we have newsreels and short subjects and trailers.

Q. Are they separately negotiated? A. Yes.

Q. You spoke of cancellations. What cancellations are customary? A. Well, it depends on the situation. The cancellations when we sell more than five pictures in a group is fixed. Where we sell five pictures in certain localities we permit elimination if we are satisfied that they cannot absorb that many, or that there were particular pictures in a group that would not be suitable for the theatres buying them. That is the reason for the fluctuation of the number of pictures sold or played eventually.

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Q. Do you have many cancellations or applications to cancel? A. There are many eliminations, yes, sir.

Mr. Davis: Now, I am going on to another topic. Perhaps your Honors will want to adjourn now for lunch?

Judge Hand: We will adjourn until 2:15.

(Recess to 2:15 p.m.)

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AFTERNOON SESSION

Mr. Seymour: May it please the Court, before the witness resumes there is one procedural problem which I should like to mention: The Government has offered, and there have been received, a number of license contracts between defendants and theatres in which other defendants have an interest. Now, we have examined the contracts which concern Paramount pictures or theatres in which Paramount has an interest, and from our examination they appear to be just standard contracts. But they are very voluminous. Now, I think that it is a situation in which the interest of the Court and counsel would be served by having the Government furnish us with a sort of informal bill of particulars as to what it is about those contracts that they rely on. I realize that ordinarily those things are done before trial; but it has only arisen by virtue of the fact that they were offered during trial; and I should like to have a statement which we could rely on as an indication of what the Government counts upon in those contracts as helping its case. And just as Mr. Wright said this morning when Mr. Davis handed up the new contracts that he would like to know what the differences are, we should

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like to know what it is that the Government relies on. Perhaps Mr. Wright will agree to do that and we won't have to bother the Court with it.

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Mr. Wright: If the Court please, we are not going to limit ourselves in any way at this time. We rely on every piece of printing that is in any of these contracts that were offered in evidence. I can see no occasion for us to tell counsel that they can ignore at this time any part of it.

Judge Hand: All right.

Now we shall proceed.

Mr. Davis: Mr. Rodgers.

WILLIAM F. RODGERS, resumed the stand. *Direct Examination continued by Mr. Davis:*

Q. I think we were discussing the subject of minimum admission prices which you told us were those prices named by the theatre itself written into the contract. What is the reason for writing any admission price into the contract?

A. Well, it has a contributory reason as to the availability of pictures in many places. It is one of the considerations we give as to when pictures can be made available; and the theatre owner in specifying the price of admission expects to get his availability in many cases based upon the price of admission that he charges.

Q. Does it have any effect upon the revenue of the distributor? A. A great deal; a great deal of effect, because it stands to reason in most cases the more the admission price is charged the greater the receipts.

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Q. How long has the practice of naming minimum admission prices in the contract prevailed? A. Well, I feel that

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the run and the clearance and the admission price, they all have such a close relation one to the other, that they commenced to be generally operative, as I said this morning, somewhere in the neighborhood of 20 years ago, 22 years ago, I can't recall exactly when; somewhere in that neighborhood.

Q. Now, it has been suggested that the provision in your contract for an audit of the exhibitor's receipts is put in for some purpose other than to protect your revenue. Is that true? A. Well, that is put in for specifically the purpose of protecting our revenue. As a matter of fact I believe that there is some clause in our contract to the effect that the theatre owner is merely the custodian of the receipts, and we want the privilege of verifying that.

Q. Do you maintain a corps of auditors for that purpose? A. We don't have a corps of auditors specifically for that purpose, but we use our auditors for that in connection with other auditing work that they do around the country.

Q. Do your auditors, when sent to the theatre, audit the general business of the theatre or only your particular contract? A. They only have a right to audit, as I understand it, the pictures played under the sharing arrangement.

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Judge Hand: This kind of thing, Mr. Davis, does not impress me at all. The charge of the Government is that they audited these reports. If these contracts are valid, they certainly have a right, a perfect right to do that; and if they are invalid, they are invalid.

Mr. Davis: And, of course, we heartily agree with that.

Judge Hand: I do not see what it has to do with the case.

Mr. Davis: And perhaps I am over-anxious in refuting a charge which seems to me to be absurd on its face, but in the trial brief the Government charges we used this system of auditing to secure information

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about the business of the theatre with our competitors and in that way to promote the general conspiracy that is charged, and I am simply trying to negative that insinuation.

Judge Hand: I suppose it is all right.

Mr. Davis: But I shan't waste any time on it.

Judge Hand: But I think it is an awfully far-fetched argument.

Mr. Davis: I never heard of any man making a contract of this sort who did not reserve the right to see whether he was being cheated, such being human nature.

Q. Do you, as a result of these audits, procure any information relating to the business of your co-defendants, com- (633)

petitors or other persons than the theatre involved? A. No, sir, never.

Mr. Davis: We will drop that subject there.

Judge Bright: You limit the audit solely to the purpose of the one picture or one series of pictures in which you are interested?

The Witness: We limit the audits to only pictures which are played under the participating arrangement. Sometimes we—

Judge Bright: What do you mean by "participating arrangement"?

The Witness: Percentage arrangement, or a dollars and cents guarantee, with the sharing arrangement beyond a certain figure.

Judge Bright: Only for pictures licensed for that theatre?

The Witness: Yes, sir, only of our own pictures.

Judge Bright: Not others'?

The Witness: No.

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Judge Bright: You have no right to audit anybody else's pictures?

The Witness: No, sir, none whatever. Nor do we have a right to audit our own pictures under the—

Judge Bright: You exercise the right to audit nobody else's picture receipts?

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The Witness: No, sir. In the first place, they wouldn't permit me to, and we have no interest in it.

Q. Let us go to theatre ownership for a moment. How many theatres does Loew's, Inc. own, if you know? A. I don't know how many we own. I think we operate in this country in the neighborhood of 130, 135, or something like that.

Q. You don't own the fee simple of all that you operate?

A. No, sir, but I am acquainted with the structure under which we operate them.

Q. Are their locations so shown in the document which has been admitted in evidence as Loew's L-2? A. Yes, sir.

Q. That is approximately correct, as far as location?

A. That is approximately correct.

Q. Is there any agreed division of territory, so far as exhibition is concerned, or sales either, between Loew's, Inc. and any of these co-defendants?

Mr. Wright: May it please the Court, we have the same objection we made before, that that is a conclusion for the Court rather than this witness.

Judge Hand: Overruled.

A. No, sir.

Q. Do your theatres always exhibit your own Loew's films? Put it this way: Do Loew's theatres always exhibit
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Loew films? A. With one exception.

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Q. What is the exception? A. The exception is in Niagara Falls where we have an interest in a theatre in Niagara Falls but our product is played in the theatre of an independent exhibitor.

Q. Do Loew films fill up playing time of all the Loew theatres? A. No, sir.

Q. Is there room for playing other films? A. Yes, sir.

Q. Are they licensed from third persons? A. Licensed from the other companies in the business, or the distributors.

Q. Who has the supervision of that licensing? A. Mr. Joe Vogel and Mr. Moscovitz.

Q. What is the difference between their respective spheres? A. Mr. Joseph Vogel has charge of all our out-of-town theatres excepting the—he has charge of all the out-of-town theatres including the Capitol Theatre here in New York, whereas Mr. Moscovitz has charge of all the metropolitan theatres, those that are in this metropolitan area in Greater New York.

Q. What is the general character of the theatres owned by Loew's, Inc.? A. They are very fine theatres.

Q. What reason is there for a producer of films owning his own theatres for exhibition purposes? A. I can only speak for our own company. I say that in our connection that the reason we have theatres in the many places we do (636)

is that we use them as show windows and use them as test spots for the establishing of values of our various pictures.

Q. And what do you mean by "show windows"? A. Well, a show window, I consider a show window is an important theatre in an important city in any particular geographical area and, generally speaking, after we test a picture in a given number of spots or localities, I should say, then we are in a position in the more lucrative territories of this country to use our own theatres as show windows where our own pictures can be played first and in that way establish their values.

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Q. How does the playing of your pictures first in your own theatres establish their value? A. Well, it is a generally well known matter, if the picture does well, it is generally known throughout that particular area; and by the same line of reasoning, if it does poorly, it is known even quicker. But then, it gives us in New York a better idea as to the cross-section value of the picture; where it is shown in so many different sections, we know very well about what the value will be for that picture for all of America.

Q. Do you make first-run contracts with any of the theatres owned by the co-defendants here at the bar? A. There are a number of first-run contracts made with them, yes.

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Q. Do you make first-run contracts with wholly independent theatres? A. Yes, in many sections.

Q. And you exhibit first-run in your own theatres? A. Yes, sir.

Q. First-run theatres play at the highest admission rates, do they? A. Generally speaking that is always true.

Q. Do they customarily produce the quickest and largest share of your revenue? A. First-run theatres that we have at Loew's, yes.

Q. Let me ask, what is the overall cost, annual cost, of maintaining your distribution system, of which you are the head? A. Well, our field forces for the last year have cost us on an average of \$115,000 a week. I believe the overhead for our New York office is somewhere between five and six million dollars a year. I don't know the exact figure now.

Q. It is substantial? A. Substantial, yes, very.

Q. You were asked by the Government in its interrogatories to name the film for the season 1943-44 which received the largest number of contracts. A. Yes, sir.

Q. You named, I believe, the film "As Thousands Cheer"? A. Yes, sir.

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Q. And the Government asked you for further information as to the revenue derived by its exhibition. Have you caused to be made or caused to be made under your direction (638)

a chart showing the revenues derived from the exhibition of that film and the ownership and class of the theatres from which they were derived? A. Yes, sir.

Q. I ask you to look at the two charts, which I will identify as L 3-a and L 3-b, and ask if those are the charts which you caused to be prepared? A. Yes, sir, these are the charts.

Mr. Davis: Before offering these in evidence I should like the Court to look at these, which I hand to the bench, in order that I may explain the purpose for which they are being offered. These are charts L 3-a and L 3-b. They are an exhibition of the data which the Government requested and put in evidence by its Exhibits 57-1 to 57-49.

The first of these charts shows the overall take of that picture of \$3,537,588. Midway of the chart there is a black line marked "Cost of negative, prints, advertising, royalties and trailers, \$2,016,000." That is the cost of making that picture. It includes nothing for distribution, nothing for overhead, but is the manufacturing cost of the film, prints, royalties and trailers. And until that line has been crossed the company is out-of-pocket.

The Government asked us for the revenue from the first runs in all cities with a population of 25,000 and

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over, 416 in number. That is the first column to the left of the chart. It is in red because it has not yet reached the cost line.

It asked us for revenue from second-runs in all cities with population of 50,000 and over. That is shown in the second column.

Colloquy

After the first column has been added, then this bit of information raises it a little further, cumulatively.

It asks us for revenue from third-runs in all cities with population of 200,000 and over. That is the third column. And after counting the column 2, you will see that there is a small addition to that column, still below the cost line.

Revenue from fourth-runs in all cities, New York, Chicago, Los Angeles, Philadelphia and Detroit, with population of a million and over, and the fourth-run adds something to this mounting column in the fourth line.

Then the fifth line is not in response to the Government's requests, but is our own statement of the entire revenue derived from that film, \$3,537,000. Your Honors will note that it does not cross the cost line, and the first-run, second-run, third-run and fourth-run have been played in these cities named. Our fourth column includes the play everywhere, our total take.

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Now, if your Honors will look at the second chart, L3-b, you will find the breakdown on each of these columns showing the sources of this revenue. The first column, revenue from first-runs in all cities with population of over 25,000, amounts taken from Loew's own theatres, Fox, Paramount, RKO, Warner and independents, are all shown in that column. It will appear that the largest revenues, as might be expected, were from Loew's own theatres; second, by reason of their number, was from Paramount's theatres; and the third was from the independents who paid us more than either Warner or RKO or Fox.

In the second column, revenue from second-run in all cities with population of 50,000 or over. Your Honors will notice that here the independents spring to the top of the sum, \$81,000 from the independents

Colloquy

in that second-run, \$59,000 from Loew's own theatres; and the next is Paramount's theatres, with \$37,000.

Then we come to the revenue from runs in all cities with a population of 200,000 and over. Again Loew's own theatres are the most productive—no, here the independents have even gone beyond Loew's, \$59,000 from the independents and only \$51,000 in Loew's own theatres.

(641) And then we come to revenue from fourth-runs in all cities with population of over a million. And here

the independents are \$55,000, and the next one is Warner's with \$18,000.

Then we come to the fourth column, which represents our total take, and your Honors will find that these first, second, third and fourth-runs and the sums contributed by the co-defendants' theatres have not yet pulled us out of the red.

And we then find that with the small amount from Paramount and a smaller amount from Warner, and \$1,288,000 from the independents, we finally made our profit.

I offer that in evidence, and I shall argue from it that if Loew's, Inc. is engaged in a conspiracy to suppress and militate against all independent theatres, it is very clear that Loew's, Inc. is industriously endeavoring to cut off its own nose to spite its face, for were it not for the independents, this \$3,537,000 could never have been earned, or the two million spent on this picture could never have been retrieved.

I offer these exhibits.

Mr. Wright: If the Court please, we, of course, obviously cannot examine this witness on the charts. He did not prepare them. He had them prepared. Now, all we want with reference to these charts is the same opportunity we gave the defendants with respect

Colloquy

(642) to ours, to check the data. Otherwise I should think

they might go in. But at this stage it seems it is a little premature to admit them until we have had an opportunity to check.

Mr. Davis: Of course there is no objection in the world to that, your Honors. Counsel may examine the chart as much as he pleases, and if he is not satisfied with Mr. Rodgers' statement that it was prepared under his direction, I am perfectly willing to produce the hands that drew the lines, and the accountants who entered the figures.

Judge Hand: We will admit it. Of course, you can check it by getting the data.

Mr. Wright: I should like to point out, your Honors, as far as this cost data is concerned, that is something that—

Judge Hand: What is that?

Mr. Wright: I just wanted to call attention to the fact that the charts do contain something more than a recap of material that is in evidence.

Mr. Davis: Yes.

Mr. Wright: There is cost data on there for which there is no underlying evidence; and we would at least want the opportunity to check with someone who prepared the cost data as to what some of these costs might represent.

Judge Hand: You will have that.

(643)

Mr. Davis: You will find on that chart not only is the cost data not included in the interrogatories which were put to us and filed, but the fourth column, the total receipts and their division is not so included. The chart is independent evidence as to those topics, and I have had the witness verify them.

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(Marked Defendant Loew's Exhibits L 3-b and L 3-a.)

By Mr. Davis:

Q. Do you remember how many theatres exhibited "As Thousands Cheer" in the United States? A. Well somewhat better than 15,000; 15,000 and some hundreds. I don't recall the exact figures.

Q. Well I am afraid that you are about 19 theatres out. A. I see.

Q. I show you a memorandum purporting to give the figures and see if it refreshes your recollection as to the number of theatres in which "As Thousands Cheer" was shown. A. The statement shows 14,981 theatres. This I had prepared.

Q. Will you break it up into theatres owned by the co-defendants, each one of them, and by the independents? A. Loew's played the picture in 145 theatres; Warner's 339; Paramount, 932; RKO in 22; the Fox West Coast in 405, or a total of 1843. And non-defendants was 13,138, a total of 14,981.
(644)

Mr. Davis: I offer that sheet of paper in evidence.

Mr. Wright: There is no objection.

Has that exhibit a number or a letter?

The Clerk: Not as yet.

Mr. Wright: We have no objection to it.

Judge Bright: That will be Exhibit L 4.

(Marked Loew's Exhibit L 4.)

Q. Mr. Rodgers, we have been confronted by the Government with a request for information as to the first-run theatres in 92 cities in the United States having a population of 100,000 and over. Laborious as it may be, I want to take up

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each one of those cities with you and ask you who runs your films first-run in that city, why the particular theatre in that city that does so is chosen by you as a first-run theatre. Have you got a list of those theatres in front of you? A. No, sir.

Q. I am not asking you to verify the list at this time but simply to guide your recollection. In Akron, Ohio, which theatre runs your film first-run? A. Loew's theatre.

Q. Is that your own theatre? A. Yes, sir.

Q. Is it your custom when you have a theatre to run your films in it first-run? A. Generally speaking, with the one exception I mentioned the other moment.

(645)

Q. What other theatres in Akron run films first-run?

A. There are three others, the Colonial, the Palace and the Strand.

Q. By whom are they owned? A. The Colonial by the Shea operation; the Strand by Warner Bros., and the Palace by Mr. Katz.

Q. Which theatre in the city has the largest seating capacity? A. Loew's theatre.

Q. Are the other three in competition with Loew's on the first-run? A. Very much so, yes, sir.

Q. Do you license any later runs in Akron? A. Yes, sir.

Q. The City of Albany: What theatre in Albany runs your films first-run? A. The Palace and the Grand.

Q. By whom are they owned? A. They are operated by Fabian.

Q. How long has he been a customer? A. Well, I should say for at least 10 or 12 years.

Q. Besides those two theatres, are there any other first-run theatres in Albany? A. Yes, there are three others: The Strand, the Ritz and the Leland.

Q. By whom are they owned? A. The Strand and Ritz are owned by Warner Bros., and I believe the Leland is also operated by Warner's, but I am not sure.

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Q. Do they compete with the theatres which you license first-run? A. Yes.

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Q. What is the largest theatre in Albany? A. The Palace.

Q. Is that your first-run theatre? A. It is one of them.

Q. How do the seats in that theatre compare with the next largest? A. They are much larger, I guess nearly twice as many as in any other theatre in town.

Q. Atlanta, Georgia: What is your first-run theatre in Atlanta, Georgia? A. Loew's Grand theatre is the first-run theatre for us there.

Q. I am reminded I did not ask you whether Fabian was an independent theatre in Albany? A. Yes, he is independent.

Q. Then we pass on to Atlanta, Georgia.

Mr. Davis: I apologize to your Honors for this if this is going to be a tedious journey, but I do not know any way to avoid it. That is, as long as the Government confronts us with these innuendoes.

Q. What is your first-run theatre in Atlanta? A. Loew's Grand Theatre.

Q. Is that your own theatre? A. Yes, sir.

Q. How many other first-run theatres are there in Atlanta? A. Six other first-runs.

Q. By whom owned? A. Well, Fox owns one—well, Publix, rather, the Publix-Lucas-Jenkins organization own (647)

the Fox; they own the Paramount; they own the Capitol and the Roxy. There is a Rialto Theatre operated by W. T. Murray; and there is a Rhodes Theatre there that is operated by us as a move-over or carry-over theatre.

Q. Explain what you mean by a move-over. A. Well, when we finish playing the picture at our Grand Theatre we

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move a great many pictures into the Rhodes where there is a continued engagement, continuous.

Q. Do the other theatres in Atlanta compete with yours?

A. Yes, sir, they all compete.

Q. How does your Loew's Grand in Atlanta compare in size and equipment and character with the other theatres?

A. Well, except for size we consider our theatre the best outlet for us in Atlanta. It is smaller than the Fox and smaller than several others.

Q. To whom do you license first-run in Baltimore, Maryland? A. The Loew's theatres, the Loew's Century, and we play some pictures in the Valencia.

Q. What other first-run theatres are there in Baltimore?

A. There are six other theatres.

Q. Who owns them? A. Mr. Mechanic owns the New Theatre; Mr. Schanberger the Keith's; Mr. Rappaport the Hippodrome; Mrs. Hicks operates the Little Theatre and the Mayfair Theatre; and Warner Bros. operates the Stanley Theatre.

(648)

Q. Do those theatres all compete with your theatres in Baltimore? A. Yes, sir.

Q. What is the largest theatre in Baltimore? A. The Stanley Theatre is the largest. Ours is next.

Mr. Wright: If the Court please, he apparently has this written out in the sheet, and I suppose if they want to have it marked as an exhibit we could stipulate that he would testify in accordance with the sheet there. It would save some time.

Mr. Davis: Well, this sheet which I and the witness have in our hands gives the names of the theatres, the towns, the name of the operator in each town, and the number of seats in each theatre. It does not describe the theatres and it does not say what is done

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about second or subsequent runs. Now, I am willing to put this in provided I can get a stipulation that the theatres in which we license our films first-run are the best and most suitable theatre in that particular locality; second, that where there is more than one first-run theatre where we have a theatre, the others are competing with us for the public patronage—

Mr. Proskauer: More than one first-run.

Mr. Davis: More than one first-run theatres.

Mr. Wright: I—

Mr. Davis: Just a moment, Mr. Wright. I am not finished.

(649)

Mr. Wright: Well, you have gone far enough to make it apparent that there won't be any stipulation.

Mr. Davis: That puts me to my proof and I shall proceed as long as I and the witness and the Court hold out.

Q. Baltimore, Maryland. A. Yes, sir?

Q. Have we left Baltimore? A. We are going from Baltimore.

Q. Birmingham, Alabama: Whom do you license first-run in Birmingham, Alabama? A. The Publix-Wilby interests.

Q. Who are they owned by? A. I believe they are in some way associated with Paramount.

Q. How many theatres have they in Birmingham? A. Four.

Q. Are there any other first-run theatres? A. The Empire operated by Mr. Merritt.

Q. Is that independent? A. Yes, sir.

Q. Do you license first-run to all the Publix-Wilby theatres? A. Yes, some of our pictures play in all of them.

Q. What is the largest theatre in Birmingham? A. The Alabama.

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Q. What is the seating capacity of the Alabama? A. 2,552.

Q. What is the seating capacity of Mr. Frank Merritt's Empire? A. 924.
(650)

Q. What theatres do you consider best adapted for first-run use in the City of Birmingham? A. The Alhambra particularly.

Q. Alhambra? A. And the Lyric and Ritz. But the Alhambra is the place where we seek to put most of our pictures.

Q. Read that again. A. The Alabama, excuse me.

Q. Yes, that is better. A. My eyesight is getting poor, I guess.

Q. Do you license second, third and fourth-runs in Birmingham, Alabama? A. I don't know just how many runs we license there but we license in addition to the first-run.

Q. I wish if I ask you about any first-run in any city you tell me whether that is your exclusive exhibition there or whether it is followed by other theatres licensing second, third and fourth-run.

Boston, Massachusetts. A. We play our product in our two theatres, Loew's State and Loew's Orpheum.

Q. What other first-run theatres are there in Boston? A. There are the Metropolitan, the Paramount, the Fenway, the Boston, the Memorial, the Translux and Majestic; and in Boston, incidentally, we market our pictures to a number of subsequent-runs.

Q. Do they compete with you? A. All of them.
(651)

Q. Why do you license first-run to Loew's State and Orpheum? A. Because we think they are the best theatres for our purposes in Boston.

Q. Any subsequent-runs licensed in Boston? A. A great many.

Q. Bridgeport, Connecticut. A. In Bridgeport, Connecticut we have four theatres. Loew's operates the Poli, Majestic,

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Globe and Lyric, and our product plays in all of them. In addition to that the Warner Bros. operate a theatre there, and there are a number of subsequent-runs to whom we supply our product.

Q. Do you license your own theatres there first-run?
A. Yes,

Q. What is the largest theatre in Bridgeport? A. I believe the Poli is the largest one there.

Q. That is your theatre? A. Yes.

Q. The Loew's theatre? A. Yes.

Q. Buffalo, New York. A. Buffalo, New York, Loew's operates the Shea's Buffalo, the Great Lakes and the Hippodrome Theatre, to whom we sell our product.

Q. Any others? A. In addition there are two other theatres, the 20th Century and the Lafayette.

Q. Owned by whom? A. One is operated by the Buffalo 20th Century, Inc., and the other by Basil Brothers.

Q. Are they both independents? A. I believe they are.
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Q. Do they compete with Loew's theatres? A. All of them.

Q. Any subsequent-runs in Buffalo? A. A great number of them.

Q. How do those theatres, as theatres in point of seating capacity and character compare with the other theatres?
A. They are the best.

Q. Cambridge, Massachusetts. A. In Cambridge, Massachusetts, there are two first-run theatres there, the Central Square, operated by M. & P., and the University Theatre operated by Stanley Sumner.

Q. Are they independent? A. No. M. & P. is operated by them for Paramount, and the University is an independent to whom we sell our product.

Q. You sell to the independent, do you? A. Yes, sir.

Q. Camden, New Jersey. A. Camden, New Jersey, there are three first-run theatres operated there now, the Savar

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operated by an independent, Sam Varbalow, and the Grand and Stanley operated by Warner Bros. We sell them both.

Q. You sell both, Varbalow and Warner Bros.? A. Yes.

Q. Is Varbalow an independent? A. Yes, sir.

Q. Any subsequent-runs in Camden? A. Quite a few, yes, sir. We sell them all or as many of them as we can.

Q. Now, I would suggest that we may make speed, Mr. (653)

Rodgers; you understand what the questions are that I am trying to get here, and if you will without waiting for a question go down the list and tell us about the towns as we come to them, and if I find anything omitted I will ask you a question, and we will make some time that way.

Canton, Ohio is the next one. A. Canton, Ohio, there are three first-run theatres there, the Palace operated by an independent; the Ohio, operated by Warner Bros., and Loew's Theatre operated by us. We sell Loew's Theatre, and there are a number of subsequent-run houses there to whom we also sell our product.

Q. All right. Charlotte, North Carolina. A. Do you want me to go forward with the list without you calling the names, or would you rather call the names?

Q. I will call the names? A. All right. In Charlotte, North Carolina, there are three first-run theatres there, the Carolina, the Imperial and Broadway. They are all operated by—I see it says amusement companies, but, in fact, I think they are controlled by the Kincey interests who are an affiliate of Paramount; and we sell our first-run pictures to each one of the three theatres.

Q. You sell to each one of those theatres? A. We sell our pictures to all three, not to each three. There are a few subsequent-runs in the city to whom we also sell our product. (654)

Q. When you say sell your product, you mean license your product? A. Lease it, yes, sir.

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Q. Lease it. Now, Charlotte. A. That was Charlotte.

Q. That was Charlotte. Chattanooga. A. In Chattanooga there are two first-run theatres also operated by the Wilby interests, associated, I believe, with Paramount, namely, the Tivoli and the State, and we sell to either one or both of them.

Q. Are there any other theatres in Chattanooga that would be entitled to claim first-run? A. There is no other first-run there, but there are a few subsequent-runs, and we offer our product to them too.

Q. Chicago, Illinois. A. Chicago, Illinois, there are a number of first-runs there. I think McVicker's is operated by Johnny Jones; the Apollo, Chicago, Garrick, by Balaban & Katz; Roosevelt and State-Lake and United Artists, by Balaban & Katz, to whom we sell our product first-run. There is also the Wood's Theatre operated by the Essaness Circuit; the Oriental by a Mr. Costello; the Palace by RKO. There is a World Playhouse operated by a Mr. Vicedomini; and the Grand Theatre is operated by RKO. We sell, as I say, or lease our product to the B. and K. interests for playing in a number of their theatres. Wherever in our opinion the picture is most suitable, that is where we sell it or lease. (654a)

it. There are many subsequent-run theatres in the City of Chicago to whom we sell our product.

Q. Who are B. & K. affiliated with, if anyone? A. B. & K. are affiliated with Paramount.

Q. How do their theatres compare with the other first-run theatres you have named in Chicago? A. Generally speaking they are by far the better theatres.

Q. I can't hear you, Mr. Rodgers? A. I say generally speaking they are by far the better theatres. (655)

Q. For how long have you been selling them or licensing them? A. For many years. Many years. Certainly beyond 10 or 15—20 years, I guess.

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Q. Has their handling of your film been satisfactory?

A. Yes, sir.

Q. Any subsequent runs in Chicago? A. Quite a number of them.

Q. Cincinnati, Ohio. A. Cincinnati, Ohio, there are eight first-run theatres there, Palace, Albee, Capitol, Lyric, Schubert, Keith, Family and Grand, and they are all operated by the RKO Midwest Corporation.

Q. Do you sell to all of them? Do you license to all of them? A. Well, we license to all of them one way or another. They have a different sort of arrangement in Cincinnati than they have in most cities. They carry over from one theatre to another, and it is not uncommon for our pictures to be played first-run in a majority of those theatres.

Q. Are there any other first-run theatres in Cincinnati?

A. No, sir.

Q. Do you license subsequent runs in Cincinnati? A. Quite a few, yes, sir.

Q. Cleveland, Ohio. A. In Cleveland, Ohio, there are seven first-run theatres, of which we have three, State, Stillman and Ohio Theatres; Warner Bros. operates the Hippo-

(656)
drome and the Lake, and the RKO Theatres are Palace and Allen.

Q. Do you license there to Loew's, Inc.? A. We license to Loew's, Inc.

Q. How do those theatres compare with the theatres of the other companies? A. We consider them best for our purpose.

Q. Are all of those theatres that you have named in competition? A. All of them, yes, sir.

Q. Subsequent runs? A. Yes, sir.

Q. Columbus, Ohio? A. In Columbus, Ohio, we operate two theatres, Loew's Ohio, and Loew's Broad, to whom we sell our products, to either one of the two, and in addition to

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that the Palace and Grand Theatres are operated by the B. F. Keith Company or the RKO.

Q. Do you sell to them? A. No, sir.

Q. Are they in competition with you? A. Directly, but we do sell a number of subsequent runs.

Q. Dallas, Texas? A. In Dallas, Texas, there are six first runs, all operated by the Interstate Theatres; Majestic, Palace, Capitol, Rialto, Melba and Tower Theatres, and we sell to them, or lease to them, and they are also licensed, like in Cincinnati, that is, in some cases they move from one house to another.

Q. Is Interstate Theatres an independent chain? A. No, (657)

sir.

Q. Who owns it? A. Associated with Paramount.

Q. Are there any other first-run theatres in Dallas? A. No, sir.

Q. Do you license subsequent runs in Dallas? A. Yes, sir, quite a few.

Q. Dayton, Ohio? A. In Dayton, Ohio, we have one theatre, Loew's, to whom we lease our product. There is also an independent operation there, the Victory Theatre, and, in addition, State, Colonial and Keith that are operated by RKO Midwest Corporation.

Q. Do you license them? A. No, sir.

Q. Are they in competition with you? A. Directly.

Q. Any subsequent runs in Dayton? A. Quite a few.

Q. How does your theatre in Dayton compare with the others? A. I consider it the very best theatre there.

Q. Denver, Colorado? A. Denver, Colorado, we sell our products, or lease it to the Orpheum Theatre. There are in addition to the Orpheum, the Denver, Paramount, Esquire, the Alladin, and the Rialto, all operated by the Fox West Coast; and in addition to that there is a Denham Theatre there, independently operated.

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Q. Who operates the Colorado Orpheum? A. We sell to the Orpheum Theatre, we lease our products, and it is operated by the RKO, but our company has an interest in it. (658)

Q. Mr. Rodgers, Judge Proskauer is very much averse to that word "sell" as being legally incorrect. If you can, call it "license" hereafter. A. I shall use the word "license."

Judge Hand: A very alarming word, Mr. Witness. It gets right into the copyright cases.

Mr. Proskauer: The word is not so alarming as the fact would be. As long as it is not a fact I don't mind the word, but I don't want him using the wrong word.

The Witness: Well, it couldn't be sold.

Judge Hand: I suppose you are only interested in this from the literary point of view.

Mr. Proskauer: I am deeply interested in the purely legal problem which your Honor expressed this morning.

Q. How does the Orpheum Theatre in Denver, which you license first run, compare with the other theatres there?

A. Compares very well. I consider it the best theatre there.

Q. Is it in competition with the other theatres? A. Yes, sir.

Q. Any subsequent runs in Denver? A. A number of subsequent runs.

Q. When I say "any subsequent runs" I mean any subsequent runs licensed by you, of course. A. Yes, sir, we (659)

license a number of runs there.

Q. Des Moines, Iowa. A. In Des Moines, Iowa, there are four first-run theatres, three of which, the Des Moines, the Paramount and Roosevelt are operated by the Tri States, I would say an affiliate of or associated with Paramount, to whom we license our pictures; and there is another theatre

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there, an RKO Orpheum Theatre, to whom we do not license our pictures.

Q. How do the Tri-States theatres compare with the Orpheum? A. I consider them the most outstanding theatres there.

Q. How long have you licensed to them? A. Sir?

Q. How long have you been licensing to the Tri-States?

A. Oh, at least 15 years or more.

Q. Been a satisfactory account? A. Yes, sir, very.

Q. Detroit, Michigan. A. In Detroit, Michigan, there are seven first-run theatres there, the Fox operated by the Fox-Michigan Corporation, the Adams, operated by the Adams Amusement Company, and there are the Michigan, United Artists, Palms State and Broadway Capitol, operated by the United Detroit Theatres, who I believe are in some way associated with Paramount and to whom we license our product; there is also another theatre there, the Downtown Theatre, which I see is listed here as owned by Howard Hughes.

Q. How do the theatres to whom you license your product (660)

first-run in Detroit compare with the other theatres that have first-run? A. I consider them the best theatres there.

Q. How long have you had that account? A. Oh, many years. At least 15, 20 years.

Q. Do you license any subsequent runs in Detroit? A. Yes, quite a number.

Q. Duluth? A. Duluth, Minnesota, there are four first-run theatres there. Norshor and the Garrick, operated by the Minnesota Amusement Company, and the Lyric also operated by that company, to whom we license our products; and then there is another theatre there, the Granada, owned by a Mr. Blackmore, to whom we do not license our product.

Q. How does Mr. Blackmore's theatre compare with the three theatres of the Minnesota Amusement Company, to

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which you license? A. I do not feel that it compares at all to the theatres that we play in.

Q. That is a two-headed reply. You say it does not compare at all? A. In other words—

Q. Does it compare favorably or unfavorably? A. I should say that I feel that our outlet is the best to be had.

Q. How long have you had that account? A. Also for many, many years.

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Q. Elizabeth, New Jersey? A. In Elizabeth, New Jersey, there are three first-run theatres, operated by the Skouras interests, in one case, operating the Liberty Theatre, and Warner Bros. operating the Regent and Ritz. We license our product to the Ritz and Regent—Ritz or Regent, I might say, both of whom compare most favorably with any other theatre in town.

Q. Are they better theatres for your purpose than the Skouras Liberty? A. I should say by far, yes, sir.

Q. Erie, Pennsylvania. A. In Erie, Pennsylvania, there are three first-run theatres, one of which is operated by the Shea interests, which is called the Shea Theatre; the other theatre, the Warner is operated by Warner Bros, and I believe also their theatre is the Colonial. We divide our product first-run and license there to both Warners and to Shea.

Q. Shea is an independent? A. Yes.

Q. Who owns the Colonial? A. I believe it is operated by Warner. I am not certain of that.

Q. Are the Shea and the Warner theatres in competition? A. Very much so, yes, sir.

Q. Fall River, Mass? A. In Fall River, Mass., there are three first-run theatres, the Durfee, Centre and the Empire, which are operated by an independent operator, Mr. Nathan Yamins, and we sell or lease our products, I should say, to

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one of the three.

Q. I see you are catching on. A. Rapidly.

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Q. Are there any other first-run theatres there, except Mr. Yamin's? A. No, sir. He operates all first-run theatres there.

Q. Any subsequent runs there? A. Yes, a number of subsequent runs.

Q. Do you license them? A. We do, yes, sir.

Q. How do those subsequent-run theatres compare with Mr. Yamin's? A. Well, Mr. Yamins owns some of the subsequent runs but they are not suitable for first-run houses.

Q. Flint, Michigan? A. In Flint, Michigan, there are four first-run theatres there, Capitol, Regent, Palace and the Garden, operated by the Butterfield interests, to whom we license our product.

Q. Is Butterfield Theatres affiliated with any of the defendants? A. I have never actually known them to be. I have never had any contact at all with anyone else except Beatty, although I have been told at one time or another that there are others of the defendants who had interests in the theatres, but I do not know it for a fact. I deal only with the general manager and president of that company.

Q. Has that rumor that some of the defendants might be interested in Butterfield had anything to do with your licensing? A. None whatsoever.

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Q. You negotiated direct with Butterfield? A. Yes, sir.

Q. Fort Wayne, Indiana? A. In Fort Wayne, Indiana, there are five first-runs, the Emboyd, Paramount, Jefferson, Palace and the Wayne, four of which are operated by the Harrison Theatre and Realty Company, to whom we license our products.

Q. Is that an affiliate or an independent? A. They are independent, to the best of my knowledge.

Q. Who owns the Wayne? A. A gentleman by the name of Pete Mallers, to whom we do not license our product.

Q. Is he an independent? A. Yes, sir, he is.

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Q. How does his theatre compare with the theatres of the Harrison Theatre & Realty Company? A. It doesn't compare at all. Very small in its capacity.

Q. Fort Worth, Texas? A. In Fort Worth, Texas, there are three first-run theatres, the Worth, Hollywood and the Palace, all operated by the Interstate Theatres, who, I believe are associated with Paramount, and to whom we license our product at first-run there.

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Q. Are there any other first-run theatres in Fort Worth? A. No, sir, but there are subsequent runs to whom we license our product.

Q. You license subsequent runs in Fort Worth. Gary, Indiana? A. In Gary Indiana there are the Palace and the Gary and the State. The latter theatre is operated by the Publix-Great States, to whom we license our product; and at the moment I cannot recall the name of the owner of the Palace or the Gary, which is listed here as affiliated. I cannot recall his name but we do not license our product to him.

Q. Why do you sell to Publix-Great States there instead of to the Palace and the Gary? A. It has been a very good outlet for us for a good many years. We feel under the circumstances it is the best outlet for us.

Q. It is not as large a theatre as the Palace, is it? A. No, it is not near as large, but we believe we can get a better representation by longer playing time, and the account has been very satisfactory over the period of years.

Q. How long have you had that account? A. Many, many years. I couldn't tell you, Mr. Davis; I don't know, but a good many years.

Q. Grand Rapids, Michigan. A. In Grand Rapids, Michigan, there are five first-run theatres operated by the But-

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terfield interests, the Majestic, Keith's, Regent, Center and

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Kent, and we license our product to the Butterfield interests for showing in those theatres or in one or all of them.

Q. Is it shown in all five theatres? A. Not necessarily, unless it is moved from one to the other occasionally, but, generally speaking, it is shown in but one of the five.

Q. Are there any other first-run theatres in Grand Rapids? A. No, sir.

Q. Any second runs? A. A number of second and subsequent runs, to whom we license our products.

Q. How do those second and subsequent-run theatres compare to the Butterfield Theatres? A. There is none of them that can compare.

Q. In size, equipment or location? A. No, sir, can't compare at all.

Q. Hartford, Connecticut. A. In Hartford, Connecticut there are eight first-runs, of which our company operates two, Loew's Poli and Loew's Palace; there is also a theatre called Dow's Theatre, operated by a Mr. Dow, I suppose—I don't know him. Mr. E. M. Loew operates a theatre; Warner Bros. operates a theatre, the Regal; and the Harries Bros. are listed as operating the State; and the Strand is also operated by Warner Bros.

Q. Do all those first-run theatres compete with yours? (666)

A. Yes, sir.

Q. Do you show first-run in any theatres in Hartford except your own? A. No, sir.

Q. Are there any subsequent run licenses in Hartford?

A. Yes, sir; and to whom we license our product.

Q. Houston, Texas. A. In Houston, Texas, there are four first-run theatres, of which one, Loew's State, is operated by us and to whom we license our product; the other three theatres, the Majestic, the Metropolitan and Kirby, are operated by the Interstate Theatres.

Q. Do you license in Houston, any theatre except your own, first-run? A. We have licensed a few pictures to Inter-

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state Theatres there when our theatre is congested in bookings, but not many.

Q. How does your theatre in Houston compare with the Majestic, Metropolitan and Kirby? A. We think it by far the best theatre in Houston.

Q. Any subsequent runs licensed in Houston? A. Yes, sir, quite a few.

Q. Indianapolis, Indiana. A. In Indianapolis, Indiana, there are five first run theatres, which we operate one, Loew's Palace; and in addition to that there is a Circle, Indiana and Lyric Theatres, operated by what is known as the Fourth Avenue Amusement Company, but which, in reality, I believe, is associated, partially, with Paramount—I am not (667)

sure of this; and then there is the Keith's theatre there operated by RKO. We sell or lease our product only to Loew's Palace Theatre.

Q. Any subsequent runs? A. Yes, we sell—or lease our product, yes, to a number of subsequent runs.

Q. Jacksonville, Florida? A. In Jacksonville, Florida, there are four first-run theatres—no, I see there are five here, four of which are controlled by the Florida Theatres Company affiliated, I believe, with Paramount. That is, Florida, Palace, Arcade and Temple Theatres; and also the St. Johns Theatre, operated by what is listed as the St. Johns Operating Company; but is, I believe, Mr. Zeid, an independent operator. We lease our product to the four theatres, Florida, Palace, Arcade and Temple.

Q. How do those four theatres compare with the theatre of the St. Johns Operating Company? A. I consider them most superior.

Q. What is their relative seating capacity? A. Well, the Florida seats 2100, the Palace 1800, the Arcade 1100, the Temple 889, and St. Johns 900. We do not play many of our pictures in the Temple Theatre.

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Q. How long have you had that account? A. For very many years.

Q. Are there any other second-run licenses? A. Quite a number, yes, sir; to whom we license our product. (668)

Q. Jersey City? A. In Jersey City there are three first-run theatres, the Loew's Journal Square, operated by our company, and the State, by the Skouras Company, and the Stanley by Warner Bros. We license our product to our own theatre.

Q. Any subsequent runs? A. Yes, a number of them to whom we lease or license our product.

Q. Kansas City, Kansas. A. In Kansas City, Kansas, there are two first-run theatres there, the Granada and the Electric Theatre.

Q. I am going back to Jersey City for a moment. Are Skouras and Warner in competition with your theatre there? A. Yes, sir, definitely.

Q. Go ahead to Kansas City. A. In Kansas City, Kansas, in that situation the Granada and the Electric Theatres are first run. One is operated by what is known as the Fox Midwest Theatres, Inc., and the other the Electric Theatre Company. I believe that they are the same operators that operate both theatres.

Q. Which one do you license? A. We license to the Fox Midwest Theatres there.

Q. You aren't sure that they are both operated by the same operator there? A. I am not sure at the moment now, but Fox Midwest Theatres has been our account for many years and I am inclined to think they are both operated by (669) the same people, although of that I am not certain.

Q. Kansas City, Missouri. A. In Kansas City, Missouri, there are seven first-run theatres, of which we operate one, the Midland Theatre, to whom we license our product. The

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others, the Uptown, Esquire, Fairway and Tower Theatres, are operated by Fox Midwest Theatres. The Newman is operated by the Paramount Kansas City Operating Corporation and the Orpheum is operated by the RKO Orpheum. We do not license except to our own theatre in Kansas City.

Q. How does your theatre compare in size? A. In size—

Q. And availability, to the others? A. In size it is a great deal larger. In all ways, it is the finest theatre in Kansas City.

Q. You license subsequent runs in Kansas City? A. Yes, sir, quite a few.

Q. Knoxville, Tennessee. A. There are four first-run theatres there, the Tennessee, the Riviera, the Strand and the Bijou, operated by the Publix-Wilby, associated, I believe, with Paramount, to whom we license our product. There are no other first-runs there that I know of.

Q. Do you license subsequent runs in Knoxville? A. Yes, sir.

Q. Are there any other theatres in Knoxville adapted
(670)

to be first-run theatres? A. Not that I know of, no.

Q. Long Beach, California. A. In Long Beach, California there are seven first-run theatres, of which Fox Westcoast controls four, the West Coast, the United Artists, the Imperial and the Long Beach. There are three that are listed as operated by Milt Arthur, State, Cabart and Rivoli. We sell or lease, rather, our produce to the Fox Westcoast Theatres.

Q. Is that an old account? A. Very old.

Q. How old? A. Well, we have been leasing to them even prior to the time the Fox Westcoast operated the theatres. We leased to them when they were more or less independent many years ago.

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Q. How do their theatres compare with the three theatres owned by Milt Arthur? A. We consider them the best theatres there.

Q. Do you license any subsequent runs in Long Beach? A. Yes, a number of them.

Q. Los Angeles, California. A. There are a number of first-run theatres in Los Angeles. I would have to count them. There are listed here twenty theatres in Greater Los Angeles, of which the Fox West Coast operated the Loew State, Grauman's Chinese, Uptown, Carthay Circle, United Artists, Four Star, Fox Wilshire, the Ritz, the Los Angeles, the Orpheum, Egyptian; RKO operating RKO Hill Street, (671)

the Pantages; Milt Arthur operates the Paramount in Los Angeles and a Paramount in Hollywood; Warner Bros. operate Warner Bros. Theatre in Los Angeles, and the Warner Bros. Hollywood Theatre, as well as the Wiltern Theatre in Los Angeles; Galston & Sutton operate the Hawaii; and Mr. Popkin has the Million Dollar, the Vogue and the Pan-Pacific.

Loew's product is licensed to Fox Westcoast and played in several theatres simultaneously, sometimes the Los Angeles, the Egyptian and Uptown, at other times Loew's State, Chinese and United Artists.

Q. Is Loew's State owned by Loew's, Incorporated? A. The building is, yes, sir.

Q. Under lease to Fox Westcoast? A. Yes, sir.

Q. How do the theatres you have named of Fox Westcoast compare with the others on your list? A. How many?

Q. How do they compare with the others on your list? A. We consider them the best outlet there.

Q. Is there competition among all these first-run theatres in Los Angeles? A. Very keen; very keen competition, yes, sir.

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Q. Is there any subsequent run out in Los Angeles?

A. There are a number of subsequent runs to whom we license our product there.

Q. Louisville, Kentucky. A. In Louisville, Kentucky, (672)

there are six first-run theatres. There are the Rialto, Strand and Brown, operated by the Fourth Avenue Amusement Company; Loew's United Artists Theatre, operated by our company; and the Mary Anderson and the National operated by the Peoples Theatre Company.

Loew's product is licensed to Loew's United Artists Theatre and occasionally, and I think frequently, carried over, I think, to the Brown Theatre there, in which we have an interest.

Q. What is the best theatre in Louisville? A. Loew's United Artists, by far.

Q. Do these theatres compete? A. They all compete, yes, sir.

Q. Any subsequent runs in Louisville? A. Yes, sir; we sell—lease subsequent runs there.

Q. Lowell, Massachusetts. A. In Lowell, Massachusetts, there are three first-run theatres, operated by Mullen & Polinski, I believe, for Paramount, or in association with Paramount. They operate the Strand and the Merrimac Square. RKO operates the Keith Theatre. We license our product to the Strand or Merrimac.

Q. How do they compare as theatres with RKO Keith Theatre? A. Very favorably, very good theatres.

Q. How long has that been your account? A. Many years (673)

Q. Memphis, Tennessee. A. In Memphis, Tennessee, Loew's operate two theatres there, the Loew's Palace and the State theatres, to whom we license our product. And in addition to them there are two theatres operated by the Malco Theatres, Inc., the Strand and the Malco, who, I be-

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lieve, are associated with Paramount; and Warner Bros. operate a theatre there, the Warner Theatre.

Q. How do the Loew Theatres in Memphis compare with the other theatres you have mentioned? A. I consider them the best theatres there.

Q. Do the other theatres compete with Loew's in Memphis? A. Yes, sir.

Q. Miami, Florida. A. In Miami, Florida, there are four theatres listed as first-run, the Capitol, Miami, Paramount and Olympia. The Capitol and Miami are operated by the Wometco Theatres, and the Paramount and Olympia are operated by Paramount Publix. The Capitol and Miami are independent theatres. The Paramount and Olympia are operated by associates of the Paramount, to whom we license our product.

Q. How do the Paramount theatres compare with those of the Wometco? A. I consider them superior theatres.

Q. The fact that they are owned by Paramount, does that have anything to do with your selection of those theatres for first-run? A. Nothing whatever to do with it. We have (674)

been selling them for many years and I believe, in one instance, before Paramount had any interest there.

Q. Milwaukee, Wisconsin. A. In Milwaukee, Wisconsin we have six first-run theatres there, the Wisconsin, the Palace and the Strand, that are operated by the Fox-Wisconsin Amusement Corporation; and Warner Bros. operate three theatres, the Warner, Alhambra and the Riverside. We license our product to the Fox-Wisconsin Amusement Company.

Q. How old is that account? A. That also is an account of many years' standing.

Q. How do the theatres of the Fox-Wisconsin Amusement Company compare with the theatres of Warner Bros. in Mil-

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waukee? A. I would say they are both on a par, as they both operate very good theatres.

Q. Are they competing? A. Very much so.

Q. Any subsequent-run license in Milwaukee? A. Yes, we license a number of subsequent-runs there.

Q. Minneapolis, Minnesota. A. In Minneapolis, Minnesota, there are eight first-run theatres, all operated by the Minnesota Amusement Corporation, the Radio City, State, Orpheum, Gopher, Aster, Century, World and Lyric, and our product is licensed to play in one or several of them. Sometimes they carry over our pictures there from one theatre to another. There are no other—

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Q. Any other first-run theatres in Minneapolis? A. There is no other there. There is none of the subsequent runs that would merit first-run consideration. However, we sell a number of subsequent runs there, or lease them.

Q. Nashville, Tennessee. A. In Nashville, Tennessee, there are four first-run theatres, of which Loew's Inc. operated one, Loew's Vendome, to whom we license our product, and there are three other theatres operated by the Crescent Amusement Company, the Paramount, the Knickerbocker and the Princess, to whom we do not lease our product.

Q. Do they compete with Loew's Vendome? A. Very much so, yes, sir.

Q. Newark, New Jersey. A. In Newark, New Jersey, Loew's operates—there are five first-run theatres, of which Loew's operates one, Loew's State, to whom we license our product. There are the Paramount and Adams theatres, operated by Adam Adams; Proctor's Palace, operated by RKO; and the Branford Theatre operated by Warner's. We do not license our product to anyone there excepting to Loew's, although we do sell a number of subsequent runs.

Q. How does Loew's Theatre in Newark compare with the theatres in these other persons' names? A. Very good.

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theatre and compares very favorably; in fact I should say it is about the best theatre there.

Q. Are they all competing? A. Yes, sir.

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Q. New Bedford, Massachusetts. A. In New Bedford there are four first-run theatres, the State, Empire, New Bedford, operated by Harry Zeitz, and the Olympia Theatre operated by Mullin and Pinanski who, I believe, are associated with Paramount. And in that case we license our product to both interests.

Q. To what? A. We license our product to both interests.

Q. Is Harry Zeitz an independent? A. Mr. Zeitz is an independent.

Q. New Haven, Connecticut? A. In New Haven there are five first-run theatres, of which Loew's Inc. operates three, Loew's Poli, Loew's College and Loew's Bijou theatres. There is a Paramount Theatre there operated by M. & P., who, I believe, are associated with Paramount; a Roger Sherman, operated by Warner's. We license our product to our own theatres, the Poli and the College and the Bijou.

Q. How does the Poli compare with the other theatres in New Haven? A. The Poli is very good. As a matter of fact the Poli Theatre there is the largest theatre in the city.

Q. M & P and Warner theatres compete with your theatres? A. They are also good theatres but we think we have the best for our purposes there.

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Q. New Orleans, Louisiana. A. In New Orleans, Louisiana, there are six or seven I should say, first-run theatres, the Saenger, Tudor and Globe theatres, operated by the Paramount-Richards organization; we have the Loew's State theatre which we operate; there are two theatres there, the Orpheum and the Liberty, operated by Singer, who, I believe, is associated with RKO; and there is a Center Theatre, which operates spasmodically, operated by a Mrs. Lazarus.

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We license our product to our own theatre, Loew's State, which is by far—

Q. How does your theatre compare with all the others you have named? A. I think it is the best theatre there. I think they are all the best theatres, generally speaking, except when I say there are some of them that are on a par.

Judge Bright: Even then you are being modest.

The Witness: Slightly, yes, sir.

Q. Do the other theatres compete with yours in spite of all your superiority? A. They all do, yes, sir.

Q. Any subsequent runs in New Orleans? A. Yes, we sell some subsequent runs there, or lease them; rather.

Q. New York. A. New York City, there are a great many first-run theatres. Those that are considered first run, I should say, are sixteen or seventeen in number.

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Name them. A. Seventeen, I believe. The Astor is one. I just don't know the name of the people that are operating that now. We used to operate it. The Ambassador Theatre in New York also is a new one, new addition for first-run motion pictures too. Then there is the Roxy, operated, I believe, by people associated with the Fox Company. The Globe and Gotham, operated by Brandt. Rialto, by Arthur Mayer. Music Hall, Radio City Music Hall Corp. I believe Mr. Rockefeller has something to do with it, but it is operated by the Radio City corporation. The Capitol Theatre, which we operate. The Hollywood Theatre of Warner's. Strand Theatre of Warner's. The Rivoli Theatre, I believe, is operated, partially at least, by Paramount. And the Paramount Theatre, operated by it. And then we have the Loew's State, and we have the Criterion Theatre. In addition to that there is a Victoria, operated by the same people whose name I don't know, that are operating the Astor Theatre. Then there is a Republic Theatre that, I think,

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Brandt operates in conjunction with the Republic Company. And there is the Winter Garden Theatre, that I believe the United Artists now have something to do with as a first-run outlet.

So far as our product is concerned, we license it to a number of different theatres, Radio City Music Hall playing some, and playing one right now as a matter of fact and the (679)

Capitol Theatre plays a number of our pictures.

Q. The Capitol is yours? A. So do Loew's State and Criterion.

Q. The Capitol, Loew's State and Criterion are yours?

A. Yes, sir.

Q. What other persons other than your own theatres, outside of Radio City Music Hall, do you license? A. We have played some pictures with the Globe and Gotham operated by Mr. Brandt.

Q. Is he an independent? A.* I believe we did sell one picture to the Paramount Company and that was about a year or two ago, for the Paramount Theatre, and we might have sold one to the Republic, but we have sold a number of first-runs, or licensed a number of first-runs, in the City of New York to different interests.

Q. You don't make a practice of running your pictures the first-run in any theatre except your own in New York, do you? A. Well, we play a great many pictures at the Radio City Music Hall—I say a great many; as many as playing time permits, but there is by far more of our product played in the theatres that we operate, like the Capitol and the Criterion and the Loew's State. By far the majority of our pictures find their way to those theatres.

Q. Are all those theatres located in the Broadway district? (680)

A. They are all located in the downtown district, yes, sir, not all on Broadway, but they are all in the vicinity.

*See p. 549 for correction.

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Q. Is there any competition in the theatre business on Broadway? A. I should say plenty.

Q. Any competition in the motion picture business among these theatres on Broadway that you have named? A. They are all in competition with each other.

Q. What would you say as to the relative excellence of the Capitol, Loew's State and Criterion compared with their competitors on Broadway? A. Well, I measure their value to us as a distributor in ability to give us film rental and, under those circumstances, I would say the Radio City and the Capitol are both the theatres that draw off the greatest revenue to us.

Judge Bright: You consider the value of a theatre by its revenue-producing ability?

The Witness: Generally speaking, yes.

Judge Bright: That is, the amount of money that they can produce determines whether they are of greater or of lesser value?

The Witness: Generally speaking, and it generally follows that they are so much better theatres.

Judge Bright: You mean better theatres in equipment?

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The Witness: Better equipment, better seating capacity as a rule, but the final measuring stick is usually where you can get the most revenue.

Q. Do you license any subsequent runs in the City of New York? A. A great number, yes, sir.

Q. Any idea how many? A. I should say five or six hundred, I guess.

Q. Let us go to Norfolk, Virginia, leaving New York for further and later consideration. A. Norfolk, Virginia, we have Loew's State Theatre there; and there are also two the-

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atres, the Norva and Granby, that are owned, I believe, by the Fabian interests; there are three theatres there operated by Mr. Wilder, known as the Newport, Colley and the Centre theatres.

Judge Bright: The Fabian Theatres own the complete interests in the theatres?

The Witness: To the best of my knowledge, they do. In this particular situation there is some sort of pooling arrangement, with which I am not wholly familiar with our Company in this particular place, where, in addition to Loew's State, we also play in some of the Fabian theatres there which were formerly owned by Wilmer & Vincent, which, to my knoweldge, was wholly independent.

Judge Bright: Was that the same Fabian you mentioned in Albany?

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The Witness: Yes, sir, but that is a separate, I believe, a separate corporation because Fabian has operated those theatres in Albany for many years, whereas in these theatres in Norfolk, and I believe he is also interested in Richmond, he just acquired the entire interest, or part interest, in Wilmer & Vincent's, within the last year. He was never operating there up until a year ago.

Q. Who do you license in Norfolk? A. Who do we license? We license the Loew's in Norfolk.

Q. Is Wilder an independent? A. Yes, sir.

Q. Does he compete with you? A. He does.

Q. Does Fabian compete with you? A. Yes, sir.

Q. Any subsequent runs in Norfolk? A. Quite a few to whom we license our product.

Q. Oakland, California. A. In Oakland, California, there are eight first-run theatres, Fox, Paramount, the Orpheum,

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Grand Lake and the Franklin, operated by Fox West Coast, and in addition to that there are three others, the T & D, Esquire and Roxy, operated by a Mr. Blumenfeld.

We license our product to the Fox West Coast Theatres.

Q. Is Blumenfeld an independent? A. Yes, sir.

Q. How do the Fox West Coast theatres compare with the three managed by Blumenfeld? A. Generally speaking, they are very superior.

Q. How long have you had that Fox Westcoast account?
(683)

A. Many years.

Q. Been a satisfactory account? A. Very.

Judge Bright: How do you know what film rentals the other theatres draw off?

The Witness: Well, you cannot tell what they draw off but I know from my dealings with individuals such as this, for instance, when you ask me that specific question, I can tell you that in Fox West Coast Theatres in Oakland, if I license a picture to be played first-run there, and the picture shows any merit at all, it is not very difficult for me to persuade the Fox West Coast people to play that picture in another theatre or to hold it another week, whereas my experience with other people is not the same, whether the picture is doing well or not. Your greatest problem with a great many individually operated theatres is to get them to play pictures for as long as the picture deserves. They like to get new pictures and change very frequently, and whereas in these particular theatres as in a good many others—

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Judge Bright: What experience—taking that particular one there—what experience have you had with Blumenfeld?

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The Witness: None whatever, except in the other neighborhood theatres, where he buys or leases our product, I have murder on earth sometimes to get him to give what we think is proper treatment to our pictures in those other theatres, and I have no reason to believe he would treat me any different in Oakland than he treats me in neighborhood theatres where I deal with him.

Judge Bright: Do you sell him all subsequent-run pictures?

The Witness: I try to; at least we license them in other theatres.

Judge Bright: Do you license any first-run pictures in any of his theatres?

The Witness: No, sir, but he has a number of neighborhood theatres in Oakland and San Francisco to whom we license pictures—to him and to his interests.

Judge Hand: To what do you attribute this, the fact that Blumenfeld is a hard trader and Fox an easier trader?

The Witness: I would say they are both very hard traders, as far as that is concerned, but between the two I usually can iron out any differences that might exist with the Fox people, whereas I am not always so

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sure—take, for instance, you mentioned this particular case here in San Francisco. I was—

Mr. Davis: A little louder.

The Witness: I was in San Francisco here just two or three weeks ago and one of the purposes that brought me there was to try to make a deal with Blumenfeld and some of his associates in some of his theatres, and his associates had not bought our pictures for six or eight months. So it finally developed that I ended up having to sell some one else where Mr.

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Blumenfeld's theatres are operating, and now I do not know that I am going to do much business with Blumenfeld in those theatres at all. In other words, you don't have a dependable outlet, whereas in the Fox Company, I may squabble with them frequently, but no matter what the differences are, they are usually ironed out.

Q. Were you selling the Fox-West Coast in Oakland before Blumenfeld came on the scene? A. Oh, yes.

Q. Fairly treated by the Fox-West Coast? A. Were we fairly treated? Yes, sir.

Q. How do their theatres in Oakland compare with the Blumenfeld theatres? A. For the most part they are much larger and better operated theatres.

Q. Oklahoma City, Oklahoma? A. In Oklahoma City there are six first-run theatres, the Criterion, Midwest, Liberty, Tower, the Warner and the State. The first four theatres are listed here as Standard Theatres—the first five theatres—and the last one, the State, operated by Mr. Noble, who I believe is an independent but whom I do not know. We lease our product to Joe Cooper there, who is associated with, I assume, with this Standard Theatres, but I know he is associated with the Paramount Company.

Q. How do the theatres in Oklahoma City, operated by Standard, compare with the theatre operated by Noble? A. With one exception, they are of large seating capacities, and certainly much better theatres.

Q. How long have you had that Standard Theatre account in Oklahoma City? A. Well, I have dealt with them—as I say, I know him as Joe Cooper—Joseph Cooper—and I dealt with him, at least our company has, for these many years, at least 15, 18, 20 years at least.

Q. Has it been a satisfactory account? A. Yes, sir.

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Q. Omaha, Nebraska? A. In Omaha, Nebraska, there are four first-run theatres, three of which are operated by Tri-States, the Orpheum, Paramount and the Omaha. Tri-States, I believe, is associated with Paramount. Then there is another theatre, the Brandeis, operated by RKO. For many years we have licensed our product to the Tri-States, Mr. Abe Black.

Q. How do the Tri-States Theatres compare with the (687)

Brandeis, operated by RKO? A. They are much larger and much better theatres.

Q. Do the RKO theatre and Tri-State theatre compete with each other? A. Yes.

Q. Have you subsequent runs in Omaha? A. Yes, we have quite a few.

Q. Paterson, New Jersey? A. In Paterson, New Jersey, there are four first-run theatres operating there, three of which, the Fabian, the Garden and Rivoli, are operated by Warner Bros. The U. S. Theatre is operated by Adam Adams, who, I believe, is in some fashion associated with Paramount. We divide our product there. We license a part of it to Adam Adams and the other, remaining part, to Warner Bros.

Q. Do you divide it on any fixed percentage or just as the trade works out? A. No, I think one-third of the product goes to Adam Adams and the other two-thirds go to Warner Bros.

Q. How are those fractions arrived at? A. In this particular case it was brought about by a very great difference of opinion between Warner Bros. and ourselves about 12 or 14 years ago. We had a rather serious disagreement and we sold Adam Adams, who was operating that theatre at that time, part of our product, and some little time later we reached an understanding with Warners and then com- (688)

menced to supply them, too, but we never felt like withdraw-

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ing our support from Adam Adams, because he came to us when we needed him, and that is how it came about.

Q. Peoria, Illinois? A. In Peoria, Illinois, there are three first-run theatres there, the Madison, the Palace and the Rialto, operated by the Great States Amusement Corporation, which is associated with Paramount, and to whom we license all our products first-run.

Q. Those are the only first-run theatres in Peoria? A. Yes, sir.

Q. Have you any subsequent runs there? A. There are a few to whom we license our product.

Q. Philadelphia, Pennsylvania? A. Philadelphia, Pennsylvania, there are listed ten first-run theatres there, of which eight are operated by Warner Bros., the Aldine, Boyd, Capitol, Earle, Fox, Mastbaum, Stanton, and Stanley, to whom we lease our product. The Studio and Erlanger are listed as operated by William Goldman—no, the Studio by William Goldberg and the Erlanger by William Goldman. We don't license our product to either one of them.

Q. How big is the Studio? A. The Studio Theatre is a very small-theatre. I imagine it is a theatre that plays mostly foreign pictures.

Q. Listed as having 398 seats. A. Very small, yes, sir.

Q. What is the biggest theatre in Philadelphia? A. The (689) biggest theatre is the Mastbaum Theatre.

Q. How many seats? A. 4800 seats.

Q. How does that compare in size and capacity with the Erlanger? A. Well, it compares much better. The Erlanger is only 1800, but, incidentally, we do not sell the Mastbaum Theatre, in Philadelphia. We have always considered it off location and for many years we did not sell it and haven't sold it lately, but we licensed our product for showing in others of the Warner theatres.

Q. You don't license the Mastbaum? A. No.

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Q. What are the Warner theatres you license in Philadelphia? A. We play some pictures in the Aldine, the others in the Boyd.

Q. How big is the Aldine? A. 1297 seats.

Q. How big is the Boyd? A. 2338. The Aldine Theatre is what we used to call a real run theatre. They put a picture in there and they will keep it for weeks and weeks, if the business merits it. The Boyd is a rather expensively operated theatre and they will keep it for a limited period of time. The Stanley Theatre has been more or less of a two or three weeks and maybe sometimes four weeks. The Earle Theatre is a week-stand house. Largely, the Fox was, I believe—

Judge Bright: How long did the Erlanger operate?

The Witness: The Erlanger has not been operating (690)

for many years. That is one of the bases of these suits that was spoken of this morning. It has been closed for many years. It just opened lately, I believe. I think it was open last week, or it was due to open, someone told me, for a particular picture, but it has been closed for a long time, for some years.

Judge Bright: Hasn't it been operating during this litigation?

The Witness: No, sir, except maybe for an occasional legitimate show which would go in there, but not with pictures. It has not been operating to the best of my knowledge.

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Q. You license the Aldine, the Boyd and the Capitol. What others in this list? A. The Earle, the Fox, the Stanton and the Stanley.

Q. Why don't you license to the Mastbaum? A. Well, we did many, many years ago license the Mastbaum, and then

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business got so bad they closed the Mastbaum. It was a very, very-expensive house. Well, we considered it to be very badly off location, so when they opened it we would not license our pictures there. We confined the licensing of our pictures to the other theatres in which we had had more favorable experience, and have not, since the theatre opened, renegotiated any deals with them at all for the Mastbaum Theatre.

Q. How does the location of the Mastbaum compare with the Erlanger? A. They are very close together. They are just within a block or two blocks of each other on Market Street.

Q. Is what you say about the Mastbaum being off location equally applicable to the Erlanger? A. I would consider so, yes, sir.

Mr. Proskauer: One block further up.

The Witness: Yes, in the same neighborhood.

We have never licensed any picture to the Erlanger Theatre.

Q. Are there any subsequent-runs licensed in Philadelphia? A. Yes, quite a few.

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Q. Pittsburgh, Pennsylvania. A. In Pittsburgh, Pennsylvania there are nine first-run theatres, of which the Loew's Company operate Loew's Penn, to whom we license our product. In addition to that there is the Harris Theatre operated by the J. P. Harris Theatre Corporation; the Harris Senator Theatre operated by the same company; the Fulton, operated by the Fulton-Shea Theatres; the Stanley, Warner and Ritz Theatres, operated by Warner Bros. The Barry Theatre, operated by the Varsity Amusement Company, and the Art Cinema by Morris Rubin.

Q. How many of them are independents? A. Sir?

Q. How many of these you have named are independents?

A. I would consider the Harris and the Senator and the Fulton to be independent, and the Art Cinema. I do not

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know who the Varsity Amusement Corporation is. It operates the Barry Theatre.

Q. Whom do you license in Pittsburgh first-run? A. We license to Loew's Penn Theatre there and also to Warner Bros' Stanley Theatre.

Q. How do they compare in size with the other theatres in Pittsburgh? A. They are the two largest theatres in Pittsburgh.

Q. Very much the largest, aren't they? A. The largest, yes, sir.

Q. Are there any subsequent-run theatres licensed in (693) Pittsburgh? A. Yes, a number of them to whom we license our product.

Q. Portland, Oregon? A. In Portland, Oregon, there are eight first-run, six of them operated by the Hamrick-Evergreen, associated with the Fox West Coast. That is the Paramount, Orpheum, Oriental, Playhouse, Music Box and Mayfair theatres. We, however, sell to the J. J. Parker Theatre interests who operate the Broadway and United Artists theatres there.

Q. Are they independent? A. They are independent.

Q. Now, Hamrick-Evergreen is Fox West Coast, is it? A. Yes, sir.

Q. Any subsequent runs at Portland, Oregon? A. Quite a few, and we license our product to them.

Q. Providence, Rhode Island? A. In Providence, Rhode Island, there are six first-run, of which we operate Loew's State Theatre there. There are three independent operations operated by Ed Fay, the Majestic, Fay's, and Carlton Theatre. There is the Strand Theatre operated by an Ed Reed, and the Keith-Albee Theatre operated by RKO.

Q. Do you license only your own theatres first-run? A. No; we have occasionally carried over some of our product for a continued first-run to Fay's Carlton Theatre, in whom we have an interest.

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Q. How does your theatre there, Loew's State, compare
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with the other theatres in Providence? A. We have by far the largest theatre there, and as such I consider it by far the best.

Q. Are there subsequent-runs in Providence? A. Yes, quite a few to whom we license our product.

Q. Reading, Pennsylvania. A. In Reading, Pennsylvania, there are six first-run theatres, of which we operate one, Loew's Colonial Theatre. In addition to that, Wilmer & Vincent operate the Embassy and Ritz; Jay Emanuel operates the Astor and Park; and Warner Bros. operate the Warner. We license only to Loew's Colonial Theatre there.

Q. Are there any other theatres in competition with you in Reading? A. They are all in competition with us.

Q. Do you license any subsequent-runs in Reading? A. Yes, sir, quite a few.

Q. Richmond, Virginia. A. In Richmond, Virginia, there are six first-run theatres of which we operate Loew's Theatre there. Morton Thalheimer operates the Byrd, State and Capitol there. The Fabian interests operate the National and Colonial. We license our pictures to Loew's, but they are shown also at the National and Colonial because of an interest we have in the operation of the Fabian theatres there.

Q. What is the best theatre in Richmond? A. Sir?

Q. What is the best theatre in Richmond? A. Well, our
(695)
theatre I consider by far the best.

Q. Are the other theatres in competition with you? A. They are all in competition with us.

Q. Do you have any subsequent-run licenses in Richmond? A. We sell quite a few, yes, sir.

Q. Rochester, New York. A. In Rochester, New York, there are six first-run theatres, the Capitol, the Palace, the Century, the Temple and the Regent, and we operate the

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Loew's Rochester Theatre there to whom we lease our product. The Palace is operated by the RKO, and I believe the Schine interests operate the Century and Temple. I am just not sure which are the names of the theatres he operates, but our product is entirely leased to Loew's Theatre.

Q. How does Loew's Theatre in Rochester compare with the other theatres? A. Our theatre is by far the largest, and I consider the best.

Q. Do the other theatres compete with you? A. Yes, they all do.

Q. Do you have any subsequent runs in Rochester? A. Quite a number, yes.

Q. St. Louis, Missouri. A. In St. Louis, Missouri, there are seven first-run theatres, of which we operate two, Loew's State and Loew's Orpheum. The Fanchon & Marco interests operate the Ambassador, the Fox, the Missouri, the St. Louis and the Shubert.

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Q. What is the Dayton Theatre Company? A. Dayton Theatre Company is our company, or, at least, it is a subsidiary of our company, but we operate the theatres, Loew's, Inc.

Q. Do you operate Loew's State and Loew's Orpheum? A. Yes.

Q. Do you license first-run only to your own theatres? A. Only to our own theatres.

Q. Are there any subsequent runs licensed in St. Louis?

A. A number of subsequent runs licensed there, yes.

Q. Do the other first-run theatres compete with your State and Orpheum? A. They all do.

Q. St. Paul, Minnesota. A. In St. Paul, Minnesota, there are six first-runs, of which five of them are operated by the Minnesota Amusement Company, associated with Paramount. They are the Paramount, Orpheum, Strand, Tower and Riviera theatres; and the World Theatre is operated by

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the Berger Amusement Company, an independent. We license our product to the Minnesota Amusement Company.

Q. What is the seating capacity of the Berger Amusement Company theatre, the World? A. It seats 800.

Q. And what is the seating capacity of the Paramount? A. 2,362; and then the Orpheum, 2,183; the Strand, 759, and the Tower 1,040, the Riviera 1,306.

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Q. How long have you been licensing the Minnesota Amusement Company first-run in St. Paul? A. For many years.

Q. How long? A. For many years.

Q. Has it been a satisfactory account? A. Very

Q. Do you know whether they were there before the World Theatre was built or not? A. I am sure they were there before the Berger Amusement Company operated the World.

Q. Are there any subsequent-runs licensed in St. Paul, Minnesota? A. Quite a few, yes, sir.

Q. Salt Lake City, Utah. A. In Salt Lake City, Utah, there are six first-run theatres, the Centre, the Utah, the Capitol, the Studio and the Marlo, all operated by the Intermountain Theatres, which is affiliated or associated in some way with Paramount, and to whom we license our product. There is also an independent operation there called the Uptown, operated by Mr. Lawrence.

Q. How does the Uptown Theatre operated by Lawrence compare with the Intermountain theatres? A. It is much smaller than the better theatres of the Intermountain, although they have one theatre that is just a very small theatre, a move-over.

Q. How long have you seen licensing the Intermountain? A. Sir?

Q. How long have you been licensing the Intermountain? A. For many years. As long as I have had anything to do with it.

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Q. Do you know whether they were on the ground before the Lawrence Theatres came? A. Oh yes, I am sure they were.

Q. Have you any subsequent-runs licensed in Salt Lake City? A. Yes, sir, a few.

Q. San Antonio, Texas. A. In San Antonio, Texas, there are five first-run theatres, all operated by the Interstate, associated with Paramount. They are the Majestic, the Aztec, the Texas, the Empire and the Prince, to whom we license our first-run product.

Q. Are there any other first-run theatres in San Antonio? A. No, sir.

Q. Do you have any subsequent-runs licensed there? A. Yes, sir, quite a few of them.

Q. Sacramento, California. A. In Sacramento, California, there are six first-run operating there, three of which are controlled by the Fox West Coast, the Senator, Alhambra and Capitol, to whom we license our product; and there are three operated there by Blumenfeld, the Tower, Esquire and Times.

Q. Is that the same gentleman you were talking about some time ago? A. Yes, sir.

Q. All right. What do you do in Sacramento? A. We do very well there. I consider our outlet there is the most desirable and by far the best operation.

Q. You license to the Fox West Coast, do you? A. For (699) many years, yes.

Q. You license all three theatres, the Senator, Alhambra and Capitol? A. Well, we license the three theatres on a carry-over basis; they don't play simultaneously, but our product plays in one of the three depending on the pictures. We naturally would rather play them in the Senator and Alhambra rather than in the Capitol. That is where most of our pictures go.

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Q. How long have you been licensing the Senator, Alhambra and Capitol? A. For many years.

Q. Is it a satisfactory account? A. Yes, sir.

Q. San Diego, California. A. San Diego, California, there are listed now 10 first-run theatres. Seven of them are operated by Fox West Coast and three by an independent. The three, I imagine, formerly owned by Mr. Mertzger, called the Spreckels, Broadway and the Tower. The Fox West Coast operations include the Fox, State, California, Adams, Orpheum, Mission and the Balboa, and they are by far the better theatres of the city.

Q. How long have you been licensing them? A. For a good many years. As far back as I can remember.

Q. Are there any subsequent runs at San Diego? A. Yes, there are quite a number to whom we license our product.

Q. Were you licensing first-run theatres before Fox came (700).

into San Diego? A. Yes, sir.

Q. Who owned the theatres then? A. Well, there was a group owning them; I believe Gore, Turner & Dahnken had something to do with it, and a number of different individuals. There was a company—I forget what the name of it was—but they operated a number of theatres in Los Angeles and in the environs.

Q. I am speaking of San Diego now. A. I know, but in Southern California they operated in a number of places there.

Q. Is the same thing true of Sacramento, that you licensed first-run the Senator, Alhambra and Capitol before they were taken by Fox West Coast? A. I do not know that all three of them were built at the time that Fox West Coast acquired them, but it had been any one of the three, if not two of the three before Fox West Coast acquired them. We had them as a very definite customer in Sacramento, yes, sir.

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Q. Now, San Francisco, California. **A.** In San Francisco, California, there are ten first-run theatres, of which Fox West Coast operates the Fox, Paramount, Warfield, St. Francis, State, to whom we license our product first-run. There is also the Golden Gate Theatre operated by RKO; and Blumenfeld operates the Orpheum, United Artists, Esquire and Tivoli.

Q. How do the theatres operated in San Francisco by (701)

Fox West Coast compare with the theatres operated by RKO and Blumenfeld? **A.** Well, generally speaking they are superior in seating capacity, so far as one is concerned, and generally speaking they are equally as good as the one that RKO operates, and Blumenfeld also operates a very good theatre in the Orpheum Theatre. But I should say that the Fox West Coast for our purpose at least is the best outlet.

Q. Were you licensing the Fox, Paramount, Warfield, St. Francis and State before Fox West Coast acquired them?

A. Well, there was a time—our company owned the Warfield Theatre, and there was a period of time when we operated the Warfield Theatre; and I do not think we did so well with it, and we later leased it to the Fox West Coast. So, therefore, for some time we were playing our product in our own theatre.

Q. How long have you been licensing to those Fox West Coast Theatres in San Francisco, licensing first-run? **A.** I could not answer you definitely on that, because I did not have charge of the West Coast when this transaction happened; but to my knowledge it has been going on for at least 12 or 15 years.

Q. Has it been a satisfactory account? **A.** Yes, sir.

Q. Are there any subsequent-runs licensed in San Francisco? **A.** Yes, we licensed a number of subsequent-runs

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there.

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Q. The Fox Theatre belonging to the Fox West Coast at San Francisco is very much the largest theatre in the city, isn't it? A. That is true; a huge place, 4,651 seats.

Q. Scranton, Pennsylvania. A. In Scranton, Pennsylvania, there are four first-run; the Strand, Comerford, Capitol and State, all operated by what we know as the Comerford-Publix, associated in some fashion with Paramount, and they are the only first-run there, and we license our product to them.

Q. There are, you say, no other first-run? A. No, sir.

Q. Are there any theatres in Scranton, Pennsylvania, of such size, capacity and equipment as would entitle them to play first-run? A. No, sir; I would say no.

Q. Seattle, Washington. A. In Seattle, Washington, there are eight first-run theatres of which the Fifth Avenue, the Paramount, the Music Hall, the Orpheum, the Blue Mouse and Music Box are operated by the Fox West Coast Theatres to whom we license our product. There is also an independent operation there called the Palomar operated by J. Danz Circuit, and the Liberty is operated by Jensen-Von Herberg, to whom we do not license any pictures first-run there.

Q. How do the theatres operated in Seattle by the Evergreen Theatres Corporation compare with the Danz theatre and the Jensen-Von Herberg theatre? A. They are far superior.

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Q. Do you have any subsequent runs licensed at Seattle? A. Yes, quite a few.

Q. How long have you been licensing the Evergreen theatres? A. For many years.

Q. Has it been a satisfactory account? A. Yes, sir.

Q. Somerville, Massachusetts. A. Somerville, Massachusetts, there are five first-run theatres, the Broadway and Teele Square, operated by Mr. Viano; the Capitol and Ball

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Square operated by M & P, who are associated with Paramount; and the Somerville theatre operated by Mr. Viano. We sell or lease, I should say, our product to the M & P interests, either the Capitol or Ball Square. The theatres are very superior and they have been a very fine account.

Q. Is Viano an independent? A. Yes, sir.

Q. You say the M & P theatres are superior in quality? A. Yes, sir, in capacity.

Q. South Bend, Indiana. A. South Bend, Indiana, there are three first-runs there, the Colfax, the Palace and the Granada. They are operated by the Great States Amusement Company, I believe their name is, and they are associated in some way with Paramount, and we license our product to them. There are no other first-run theatres there.

Q. Are there other theatres in South Bend which by their quality, location or equipment, would be entitled to be (704)

considered first-run theatres? A. No, there are not.

Q. Do you have any subsequent runs licensed in South Bend? A. We do license subsequent-run accounts there, yes.

Q. Spokane, Washington. A. In Spokane, Washington, there are four first-run theatres, the Fox, Orpheum, State and Granada, all of which are operated by Fox West Coast to whom we license our product. There are no other first-run theatres there.

Q. Are there any other theatres in Spokane which by their quality, character and location, are entitled to be considered as first-run? A. No.

Q. Do you have any subsequent runs licensed in Spokane? A. Yes, sir.

Q. Springfield, Massachusetts. A. Springfield, Massachusetts, there are six first-run theatres; the Palace is operated by my company; the Paramount and Broadway theatres are operated by the Western Massachusetts organization, which is in some way associated with Paramount; and the

William F. Rodgers—By Defendant—Direct

Capitol and Art theatres are operated by Warner Bros.; and an independent operation called the Bijou, operated by A. Anders. We license our product to our own theatre there.

Q. How does your theatre compare in size and quality with the other theatres? A. It is by far the best theatre (705) there.

Q. Is there competition among them? A. Yes, sir, keen.

Q. Do you have any subsequent runs licensed in Springfield, Massachusetts? A. Yes, sir.

Q. Syracuse, New York. A. In Syracuse, New York, there are six first-run theatres there, the RKO Keith operated by the S.K.E. Company, which is in some way identified with RKO; the Paramount, the Eckel, the Empire, likewise operated by them, I believe; and we operate two theatres, Loew's State and Loew's Strand theatres.

Q. To whom do you license your first run? A. We license our pictures to our own theatres there, which, incidentally, are by far I should say the best theatres in the city.

Q. Is there competition with the other first-run theatres? A. Yes, sir.

Q. Are there any subsequent runs in Syracuse? A. Quite a few, yes.

Q. Tacoma, Washington. A. In Tacoma, Washington, there are five first-run theatres, the Roxy, Music Box and Blue Mouse, operated by John Hamrick Theatres, but they are in fact associated with Fox West Coast; and then there are two independent operations, the Rialto, operated by Mrs. Moore and Mr. Ousley, and the Riviera by Barovic, whom I don't know. We license our product to the John Hamrick (706)

Theatres, and have for a number of years.

Q. Are you sure that Fox West Coast has an interest in the John Hamrick Theatres? A. I would not swear to it, no, sir, but I am reasonably sure.

William F. Rodgers—By Defendant—Direct

Q. I find a disposition here at this table to dispute you about that? A. Maybe they know better than I do; I am only assuming.

Q. Maybe we had better put that down at tentative. How long have you licensed to the John Hamrick Theatres in Tacoma? A. For many years.

Q. How do their theatres compare with the others? A. Much better theatres.

Q. Have you any subsequent runs licensed at Tacoma? A. Yes, sir, quite a few.

Q. Tampa, Florida. A. In Tampa, Florida, there are four first-run theatres, the Tampa, the Strand, the Park, and the Florida. There is also an individual theatre there, the State, operated by an individual, Mr. Gore. We lease our product to the Tampa, the Strand and the Park.

Q. Is Gore an independent? A. Yes, sir.

Q. Who owns the other theatres? A. Well, there is a Florida Theatre that is operated by the Florida Theatres Company, and the other three are operated by the Florida Theatres Company, who, I believe, are associated with Paramount.

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Q. How do those theatres compare with the Gore theatre? A. Much larger and much better. They are larger and better.

Q. Toledo, Ohio. A. In Toledo, Ohio, there are seven first-run theatres, the Paramount and Princess, I believe operated by Balaban & Katz; there is Loew's Esquire and Loew's Valentine operated by our company; and there are three theatres, the Granada, Rivoli and Pantheon, operated by Mr. Skirball.

Q. Are they independent? A. Mr. Skirball is independent; Balaban & Katz I imagine are associated with Paramount.

William F. Rodgers—By Defendant—Direct

Q. Whom did you license in Toledo? A. We license our products to Loew's theatres in Toledo; that is, the Valentine and the Esquire.

Q. Now the Valentine and the Esquire in Toledo are not as large as the Paramount of Balaban & Katz, or the Rivoli of Skirball, are they? A. That is true, they are not as large. We have owned, however, the Valentine Theatre—at least the Valentine Theatre—for a long time before the Paramount was ever built, and I believe before the Rivoli was built.

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Q. And you license to them because you own them? A. Yes. We have had this Loew's Valentine for a good many years, and within the last few years also acquired the Esquire. So we figured that between the combination of what we have we are better off than we would be with either a larger seating capacity house and certainly one that cost as much money to operate as the Paramount does.

Q. Are there any subsequent runs licensed at Toledo? A. Quite a few, yes, sir.

Q. Trenton, New Jersey. A. In Trenton, New Jersey, there are seven first-run theatres, the Mayfair, the Stacy, the Lincoln, the Capitol, the State, the Trent and the Palace. The Lincoln, Capitol, State, the Trent and the Palace, are operated by RKO; the Mayfair and Stacy are operated by Mr. Hildinger. We license our product to the RKO interests there.

Q. How do its theatres compare with the Hildinger theatres? A. They are by far the better theatres.

Q. How long have you licensed RKO at Trenton? A. We licensed to Trenton before RKO operated there; we licensed to an independent who disposed of his interest or part of his interest to RKO. For many years we have sold those theatres.

Q. It has been a satisfactory account? A. Yes, sir.

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Q. Tulsa, Oklahoma? A. In Tulsa, Oklahoma, there are (709)

four first-run theatres, the Ritz, Orpheum, Majestic and Rialto, operated by an independent named Ralph Talbot, to whom we license our product. There are no other theatres there; no other first-run theatres there.

Q. Utica, New York? A. In Utica, New York, there are three first-run theatres, the Avon, Olympic and Stanley. The Avon and Stanley are operated by Warner Bros., and the Olympic by C. C. Gordon. We license our products to the Warner interests, and there are no other first-run theatres there.

Q. How do the Avon and Stanley compare with the Olympic Theatre? A. They are superior in every way.

Q. Washington, D.C. A. In Washington, D.C. there are seven first-run theatres, Loew's Palace, Loew's Capitol, Loew's Columbia, which are operated by our company. The Earle and Metropolitan are operated by Warner Bros., Keith's, operated by RKO; and the Little Theatre there, which is more or less of a revival theatre, operated by Mrs. Miller.

Q. How big is that? A. 290 seats.

Q. Very well. To whom do you license in Washington?

A. We license our products to Loew's Theatres there.

Q. First-run? A. Yes, sir.

Q. How do the Loew's Theatres compare with those of Warner Bros., RKO and Mrs. Miller? A. Well, the two of (710)

our theatres are by far the largest theatres there and the best theatres in Washington. Our Columbia Theatre does not compare with some of the others, but the other two, the Capitol and the Palace are very fine theatres.

Q. Do the Earle, Metropolitan and RKO Keith's compete with you? A. Yes, sir.

William F. Rodgers—By Defendant—Direct

Q. Are there any subsequent runs in Washington? A. Yes; we lease a number of subsequent runs there.

Q. Wichita, Kansas? A. In Wichita, Kansas, there are five first-run theatres, the Miller, the Orpheum, the Palace, the Wichita, and the Sandra, all controlled by Fox-Midwest, and to whom we license our products, and there are no other first-run theatres there.

Q. Are there any subsequent runs? A. Yes, sir, quite a few.

Q. Wilmington, Delaware? A. Wilmington, Delaware, there are five first-run theatres, the Rialto, Aldine, Queen, the Warner and Grand Opera House. The Rialto is owned by an individual, Mr. Belair; the Aldine is operated by us; and the Queen, Warner and Grand Opera House are operated by Warner Bros. We license our produce to our own theatre and do not to the others, and there are no other first-run theatres there.

Q. How does your theatre compare with the others? (711)

A. It has the largest seating capacity and I believe the nicest theatre there.

Q. Do the other theatres compete with you? A. Yes, sir.

Q. Are there any subsequent runs in Wilmington? A. A few, yes, sir.

Q. Yonkers, New York? A. In Yonkers, New York, there are two first-run theatres, Proctor's, operated by RKO, and Loew's Yonkers, operated by our company; and we licensed our product to the Loew's Theatre; and there are no other first-run theatres there, or none competent to be a first-run.

Q. How does your theatre compare with Proctor's? A. It is larger by far, and a better theatre.

Q. Youngstown, Ohio? A. In Youngstown, Ohio, there are first-run theatres, the Warner, the Paramount, the Park and the Palace. The first three are operated—there is some sort of pooling arrangement between Warner and an inde-

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pendent, the Shea interests, to whom we license our product. The Palace Theatre is operated by Mr. Printzen to whom we do not lease our product.

Q. You license Warner there, do you? A. We license Warner and Shea.

Q. How do their theatres compare with the Palace operated by the Pallmerco? A. Well, the Warner Theatre is a much larger theatre than any of the others, and, generally (712)

speaking, with the carry-overs and so forth, I would say that it is superior to the Palace.

Q. How long have you been licensing Warner at Youngstown? A. We have been licensing either Warner or Shea in Youngstown for many years.

Q. It is a satisfactory account? A. Yes, sir.

Q. Any subsequent-runs licensed at Youngstown? A. Yes, sir.

Mr. Davis: That completes the grand tour, but I have a few more questions before the bell rings.

Q. Are there any localities in the United States, Mr. Rodgers, where one or more of the defendants here other than Loew's are operating theatres but in which Loew's licenses all of its product to an independent? A. Oh yes, a number of those places.

Q. Are there any cases where Loew's would divide its product between an independent and one of the defendants?

A. There are quite a few of those, too, yes, sir.

Q. Can you tell me how many localities there are where the defendants have theatres but Loew's licenses all its products first-run to an independent? A. I believe there is slightly somewhere in excess of 100 such places.

Q. Can you tell me how many places there are where both independents and defendants have theatres and Loew's di-

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vides its product between them? A. Well, there are thirty
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some places that I know of where we so divide our products.

Mr. Wright: May I make a suggestion? It would save some time, I think, for the cross-examination tomorrow if we could have a list of those hundred places where you say the independents are licensed and the thirty where the product is split. D

Mr. Davis: We will furnish a schedule of that.

Q. You can supply such a schedule, can you, Mr. Rodgers? A. Yes, sir.

Judge Hand: Do these 93 cases cover the cases or most of the 73 cities in the Government's trial brief?

Mr. Wright: He covered, I believe, the entire 92 with populations of over 100,000.

Judge Bright: How about the 73 that are on your pages 17 to 19 inclusive?

Mr. Wright: Those are included, and he covered 19 more that also have more than 100,000 population as per the 1940 census.

Mr. Davis: Covered all those as to which an interrogatory was addressed to us and which have been introduced in evidence. That was for 72 and 73, and this is 92, the tour we have just taken.

Judge Hand: In other words, these 20 towns more or less are things that have been added because of information you have given since?

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Mr. Davis: Added to the schedule which was in the trial brief. I do not know whether the information is later or earlier, really.

Judge Hand: All right.

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Mr. Davis: It is an overlap of something like 20 towns.

Now, at the moment I think I have nothing more to ask Mr. Rodgers; but if any of my colleagues at the table have anything to ask him, I shall put him in their hands before I turn him over to Mr. Wright.

Judge Hand: We shall adjourn until tomorrow morning at 10:30.

(Adjourned to Tuesday, October 23, 1945, at 10:30 o'clock a.m.)

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Mr. Davis: The defendant, Loew's Incorporated, without waiving its right to offer evidence in the event this motion is not granted, moves pursuant to Rule 41(b):

1. To dismiss the petition, filed herein on July 20, 1938, and the amended and supplemental complaint, filed herein on November 14, 1940, in so far as the Government seeks the relief prayed for in paragraphs (2), (3), (4), (6), (7), (8), (10) and (11) of Section VIII of said petition and in paragraphs (2), (3), (5), (6), (7), (8) and (9) of Section VIII of said amended and supplemental complaint, on the ground that upon the facts and the law, the plaintiff has shown no right to such relief or any part thereof.

2. To strike, as to the defendant, Loew's Incorporated, the following exhibits, portions of exhibits and evidence from the record on the grounds hereafter specified:

APPEAL BOARD DECISIONS

(1) So much of Exhibit 1. (Appeal Board Decisions, Volume 1) as is composed of Appeal Board Decisions numbers 18, 35, 40, 58, 61, 66, 67, 70, 71, 72 and 87, and Exhibit 292 (decision No. 111), it appearing on the face of said decisions that neither Loew's, Incorporated, nor any corporation or agent

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in any way controlled by Loew's Incorporated, was a party to the proceedings referred to therein, and upon the further ground that the plaintiff has failed to connect either Loew's Incorporated or any corporation or agent controlled by Loew's Incorporated with any of the parties to said proceedings and that the

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plaintiff has failed to establish by said decisions, or by any other proof or inference, any combination or conspiracy to which the defendant, Loew's Incorporated or any corporation or agent controlled by Loew's Incorporated is a party.

20TH CENTURY-FOX FILM CORPORATION

(2) Exhibits 12, 13, 20-24, 28-45, 160, and all sub-letters thereof, on the ground that said exhibits being concerned with the organization and business of the Fox Film Corporation are not competent evidence as against the defendant Loew's, Inc., the plaintiff having failed to establish either by this evidence or by any proof or inference any combination or conspiracy to which the defendant Loew's, Inc., or any corporation or agency controlled by Loew's, Inc., is a party.

PARAMOUNT

(3) Exhibits 8, 9, 59, 60-66, 70-73, 78-85, 161, 162, 373 and 374 (same reason as Fox).

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RKO

(4) Exhibits 86-88, 91-101, 105-112, 158, 159 (same reason as Fox).

WARNER

(5) Exhibits 116-129, 156 and 157 (same reason as Fox).

COLUMBIA PICTURES.

(6) Exhibits 130-139 (same reason as Fox).

UNITED ARTISTS CORPORATION.

(7) Exhibits 140-147 (same reason as Fox).

*Colloquy***BIG U FILM EXCHANGE.**

- (8) Exhibit 148 (same reason as Fox).

UNIVERSAL CORPORATION.

- (9) Exhibits 149-153 (same reason as Fox).

MISCELLANEOUS.

(10) Exhibits 164-167, 169, on the ground that the said exhibits show on their face that neither the defendant Loew's, Inc., nor any corporation or agent controlled by the defendant Loew's, Inc., is in any way connected therewith, the plaintiff having failed to establish either by this evidence or by any other proof or inference any combination or conspiracy to which the defendants Loew's, Inc., or any corporation or agency controlled by Loew's, Inc., is a party.

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LICENSE AGREEMENTS.

(11) Exhibits 174, 175, 177, 178, 179, 180, 189-192, 194-196, 198-209, 218, 219, 221-227, 229, 230, 232, 233, 236-242, 244-246, 251-261, 263, 265-268 and 271-274. Said agreements show on their face that neither the defendant Loew's, Inc., nor any corporation or agent controlled by the defendant Loew's, Inc., is in any way connected with said agreements, the plaintiff having failed to establish either by this evidence or by any other proof or inference any combination or conspiracy to which the defendants Loew's, Inc., or any corporation or agency controlled by Loew's, Inc., is a party.

"REPRESENTATIVE" FORMS OF FILM LICENSES.

(12) Exhibits 275, 276, 279-290, said agreements show on their face that neither the defendant Loew's, Inc., nor any corporation or agent controlled by the

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defendant Loew's, Inc., is in any way connected therewith, the plaintiff having failed to establish either by this evidence or by any other proof or inference any combination or conspiracy to which the defendants Loew's, Inc., or any corporation or agency controlled by Loew's, Inc., is a party.

UNREPORTED DECISIONS AND CONSENT DECREES.

(719) (13) Exhibit 299, upon the ground that said exhibit shows on its face that neither the defendant Loew's, Inc., nor any corporation or agent controlled by the defendant Loew's, Inc., is in any way connected therewith, the plaintiff having failed to establish either by this evidence or by any other proof or inference any combination or conspiracy to which the defendants Loew's, Inc., or any corporation or agency controlled by Loew's, Inc., is a party.

ADDITIONAL INFORMATION SUPPLIED BY DEFENDANTS—OTHER THAN LOEW'S.

(14) Exhibits 350-355, 357, 358, 360-362, 364-374, said communications from counsel for other defendants show on their face that neither the defendant Loew's, Inc., nor any corporation or agent controlled by the defendant Loew's, Inc., is in any way connected with said communications or the subject matter thereof, the plaintiff having failed to establish either by this evidence or by any other proof or inference any combination or conspiracy to which the defendants Loew's, Inc., or any corporation or agent controlled by Loew's, Inc., is a party.

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Mr. Seymour: The Paramount defendants, Paramount Pictures, Inc. and Paramount Film Distribut-

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ing Corporation, pursuant to Rule 41 (b), and without waiving their right to offer evidence in the event these motions are not granted, make the following motions addressed to the petition and the amended and supplemental complaint and to the exhibits and evidence offered by the plaintiff, upon the grounds hereinafter set forth.

1. Said defendants move to dismiss each and every allegation of the petition and the amended and supplemental complaint not connected with or having to do with the issues disposed of by the Consent Decree entered herein on or about November 19, 1940, on the ground that upon the facts and the law the plaintiff has shown no right to the relief sought or any part thereof.

2. Said defendants move to dismiss the petition and the amended and supplemental complaint in so far as the plaintiff seeks thereby the relief or any thereof prayed in paragraphs (4), (5) and (6) of Section VIII of the petition filed herein July 20, 1938, or in paragraphs (5), (6) and (7) of Section VIII of the amended and supplemental complaint filed herein November 14, 1940, on the ground that upon the facts and the law the plaintiff has shown no right to such relief or any part thereof.

(721) 3. Said defendants move to dismiss the petition and the amended and supplemental complaint in so far as the plaintiff seeks thereby to separate or divorce the production or distribution of motion pictures by these defendants or either of them from the exhibition of motion pictures by Paramount Pictures, Inc. or by any corporation all or any part of the stock of which is owned or controlled by Paramount Pictures, Inc.,

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on the ground that upon the facts and the law the plaintiff has shown no right to such relief or any part thereof.

4. Said defendants move to dismiss the petition and the amended and supplemental complaint in so far as the plaintiff seeks thereby to dissolve any corporation in which Paramount Pictures Inc. directly or indirectly has any stock interest or to dissolve any corporation in which Paramount Pictures Inc. has directly or indirectly any stock interest, and which is engaged in the exhibition of motion pictures, or owns directly or indirectly any stock interest in any corporation so engaged, on the ground that upon the facts and the law the plaintiff has shown no right to such relief or any part thereof.

5. Said defendants move to dismiss the petition and the amended and supplemental complaint in so far as the plaintiff seeks thereby to dissolve or break up any circuit of theatres in which Paramount Pictures Inc., or any corporation in which it has directly

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or indirectly any stock interest, has any interest, on the ground that upon the facts and the law the plaintiff has shown no right to such relief or any part thereof.

6. Said defendant moves to dismiss the petition and the amended and supplemental complaint in so far as the plaintiff seeks thereby to require Paramount Pictures Inc., or any corporation in which it has directly or indirectly any stock interest, or any circuit of theatres in which Paramount Pictures Inc., or any such corporation or circuit is interested, to divest itself of any or all of its or such corporation's or such circuit's interests, direct or indirect, in motion pic

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ture theatres, on the ground that on the facts and the law the plaintiff has shown no right to such relief or any part thereof.

MOTIONS TO STRIKE EXHIBITS NOT RELATED TO PARAMOUNT DEFENDANTS.

The defendants Paramount Pictures Inc. and Paramount Film Distributing Corporation move to strike, as to them, the following exhibits and evidence from the record upon the grounds hereinafter stated:

1. That portion of Exhibit 1 (being Volume I of the Appeal Board Decisions) constituting Appeal Board Decisions Nos. 10 and 18:

The foregoing motion to strike is made upon the ground that it appears upon the face of each of said

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Appeal Board Decisions Nos. 10 and 18 that neither Paramount Pictures Inc. nor Paramount Film Distributing Corporation were parties to the arbitration proceedings in which such decision was rendered, and that there is no proof in the record connecting either of these defendants with any of the parties to such arbitration proceedings; that there is no proof of any combination or conspiracy to which these defendants are, or either of them is a party and that none of said decisions tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

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2. Exhibits 12, 13, 20(a)-20(1) inclusive, 21, 22, 23, 24, 28, 28(a)-28(g) inclusive, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45.

Of the foregoing Exhibits 12, 13, 14, 15, 16, 17, 18 and 19 consist of theatre lists purporting to show the theatre interests of defendants Loew's, Warner Bros., National Theatres, and R.K.O. respectively.

Exhibits 12, 13 and 20-45 referred to above were offered by the Government as being list of National's theatres and "Fox's Answers to the Government's Interrogatories."

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These defendants move to strike these Exhibits 12, 13 and 20-45 upon the ground that there has been no proof connecting defendants Paramount Pictures Inc. or Paramount Film Distributing Corporation, or either of them, with defendants Twentieth Century Film Corporation or National Theatres Corporation or any of their subsidiary or affiliated companies; and no proof tending to show any combination or conspiracy between these corporations or any of them and the Paramount defendants or either of them; that none of said exhibits tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

3. Exhibits 46-58.

These defendants make the same motion with respect to these exhibits offered under the heading "Loew's answers to the Government's Interrogatories."

*Colloquy***4. Exhibits 86-114.**

These defendants make the same motion with respect to these exhibits offered under the headings "Answers of R.K.O., K.A.O., R.K.O. Midwest, Pathe

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News, R.K.O. Proctor Corporation, R.K.O. Radio Pictures Inc. and the Van Buren Corporation to Government's Interrogatories."

5. Exhibits 116-129.

These defendants make the same motion with respect to the exhibits offered under the heading "Warner Bros. Pictures Inc. answers to the Government's Interrogatories."

6. Exhibits 130-139.

These defendants make the same motion with respect to the exhibits offered under the heading "Columbia's answers to the Government's Interrogatories."

7. Exhibits 140-145.

These defendants make the same motion with respect to the exhibits offered under the heading "United Artists' answers to the Government's Interrogatories."

8. Exhibits 146-150.

These defendants make the same motion with respect to the exhibits offered under the heading "Answers of Universal Pictures Company Inc., Big U Film Exchange Inc. and Universal Corporation to Government's Interrogatories."

9. Exhibits 153, 154, 156-160 and 163, being theatre lists of other defendants offered under the headings of "Tabulations of Theatres" and "1945

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Theatre Lists" and Exhibits 164 and 166 offered under the heading "Information as to Theatre Interests and

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Extent of Affiliation of Defendants, furnished by Non-Defendants."

These defendants move to strike these exhibits on the ground that there has been no proof connecting these defendants or either of them with such evidence and no proof of any combination or conspiracy to which they are or either of them is a party; that none of these exhibits tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

10. Exhibits 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193 and 194 offered by the Government under the heading "Representative Master Licensing Agreements between Five Producer-Exhibitors Covering the 1936-37 Season."

These defendants move to strike these exhibits upon the ground that they are agreements to which neither of these defendants is a party and that there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party, and that this evidence and these agreements do not tend to establish any such combination or conspiracy; and on the further ground that there is no

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proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any

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part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

11. Exhibit 199 offered under the heading "Representative Master Licensing Agreements for the Exhibition of Films Released by United Artists, Universal and Columbia Pictures in Theatres of the Producer-Exhibitor Defendants during the 1936-37, 1937-38 and 1938-39 Season." This Exhibit 199 is described as "United Artists pictures in Fox theatres."

These defendants move to strike this exhibit upon the ground that neither of them is a party to the agreement; that there is no proof of any combination or any conspiracy to which these defendants are or either of them is a party; that such agreement does not tend to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

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12. Exhibits 200, 201, 202, 203, 204, 211, 212, 213, 214, 216, 217, 219, 220, 223, 228, 229, 230, 231, 235, 237, 238 and 239 offered under the heading "Theatre Pooling Agreements between the Producer-Exhibitor Defendants and Their Theatre Operating Affiliates, Now in Effect."

These defendants move to strike these exhibits upon the ground that the exhibits show that neither of these defendants is a party thereto; that there has

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been no proof connecting these defendants or either of them with such agreements; and no proof of any combination or conspiracy to which these defendants are or either of them is a party; that none of these exhibits tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

13. Exhibits 245, 246, 247, 248, 249, 252, 253, 254, 256, 257 and 258 offered by the plaintiff under the heading "Representative Film Licensing Agreements between the Producer-Exhibitor Defendants Governing Feature Films Released During the 1943-44 Season."

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These defendants move to strike these exhibits upon the ground that the exhibits show that neither of these defendants is a party thereto; that there has been no proof connecting either of these defendants with any of said agreements; and no proof of any combination or conspiracy to which these defendants are or either of them is a party; that these exhibits do not tend to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

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14. Exhibits 259, 260, 262, 263, 264, 265, 266, 268, 269, 270, 271, 272 and 274 offered by the plaintiff under the heading "Licensing Agreements between United Artists, Universal, and Columbia, and the Major Producer-Exhibitor Defendants Covering Feature Films Released During the 1943-44 Season."

These defendants move to strike these exhibits upon the ground that the exhibits show that neither of these defendants is a party thereto; that there has been no proof connecting these defendants or either of them with any of said agreements; that there has

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been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that these exhibits do not tend to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

15. Exhibits 275, 276, 277, 278, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290 offered under the heading "Representative Printed Forms of Feature Film Licenses Used and Supplied by the Eight Distributor Defendants."

These defendants move to strike these exhibits upon the ground that there has been no proof connecting these defendants or either of them with any agreement of these forms or of any of the terms thereof; that there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that none of these forms of agreement

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tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove

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any such monopolization attempt or combination or conspiracy.

16. Exhibit 298 offered under the heading "Consent Decree Arbitration Awards Where No Appeal Taken."

These defendants move to strike this exhibit upon the ground that neither of these defendants was a party thereto; that there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that this exhibit does not tend to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

17. Exhibit 299 "Findings of Fact and Conclusions of Law in United States v. Crescent Amusement Co."

These defendants move to strike this exhibit upon the ground that the facts found are not *res judicata* and cannot form the basis of or constitute evidence of another proceeding; that there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that such exhibit does not tend to prove any such combination

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or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business; or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

18. Exhibits 312-317 constituting the N.R.A. Code, the Bertrand Report, etc.

These defendants move to strike these exhibits upon the ground that they are incompetent, irrelevant and immaterial or hearsay and upon the ground that there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that none of these exhibits tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

19. Exhibits 355, 356, 357, 358, 362, 364, 365, 366, 369, 370 and 371, being letters from counsel for other defendants and answers of Universal and United Artists to the Government's further Interrogatories.

These defendants move to strike these exhibits

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upon the ground that they are not binding upon them; that there has been no proof of combination or conspiracy; that none of these exhibits tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these de-

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defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

MOTIONS TO STRIKE EXHIBITS REFERRING TO OR CONNECTED WITH PARAMOUNT.

The defendants Paramount Pictures Inc. and Paramount Film Distributing Corporation move to strike, as to them, the following exhibits and evidence from the record upon the grounds hereinafter stated:

1. Those portions of Exhibits 1-5 inclusive comprising Appeal Board Decisions Nos. 1, 10, 12, 24, 27, 35, 40, 52, 58, 61, 63, 65, 66, 67, 68, 70, 71, 72, 85, 87, 104; all of Exhibits 291 and 292; and all of Exhibits 293-297 (the foregoing exhibits constituting selected Appeal Board Decisions and decisions of Arbitrators in proceedings in which one or both of the Paramount defendants were parties).

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These defendants move to strike these exhibits on the grounds that (a) they do not constitute evidence of the facts found; (b) they do not constitute evidence of any violations of law; (c) they are hearsay; (d) such exhibits and the evidence therein contained are irrelevant and immaterial to any of the issues in this case; (e) such exhibits and the evidence therein contained are irrelevant and immaterial to the issues of divorcement and dissolution; (f) there has been no proof of any combination or conspiracy to which these defendants are or either of them is a party; that none of said exhibits tends to prove any such combination or conspiracy; and on the further ground that there

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is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

2. Exhibits 8 and 9 (being respectively described as "Paramount's theatres" and "Paramount's pooled theatres").

These defendants move to strike these exhibits upon the grounds (a) that the evidence contained in these exhibits, being lists and other information with respect to theatres in which Paramount was directly

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or indirectly interested as of the date of said exhibits, to wit, 1939, is irrelevant and immaterial to any of the issues in this case; (b) that such exhibits and the evidence therein contained are irrelevant to the specific issues of divorcement and dissolution; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

3. Exhibits 59-63, 65 and 66, offered under the heading "Paramount Answers to Government's Interrogatories—Organization—1939 Answers."

These defendants move to strike these exhibits on the grounds that (a) they do not contain any evidence or facts relevant to the present issues, but merely speak as of the date of such exhibits, to wit, in 1939; (b) they do not contain evidence relevant or material to the issues of divorcement and dissolution;

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and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove

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any such monopolization attempt or combination or conspiracy.

4. Exhibit 64, offered under the heading "Paramount's Answers to the Government's Interrogatories—1945 Answers."

These defendants move to strike this exhibit on the ground that it is irrelevant and immaterial to any of the issues in this case, and to the issues of divorce and dissolution, being merely a list of all corporations, whether engaged in production, distribution or exhibition of motion pictures or not, in which Paramount Pictures Inc. has any stock interest whatsoever; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

5. Exhibits 63, 70 and 71, offered under the heading "Paramount's Answers to the Government's Interrogatories—Production—1939 Answers."

These defendants move to strike these exhibits upon the ground that (a) they are irrelevant and immaterial to any issue in this case; (b) that they are irrelevant and immaterial to the issues of divorce and dissolution; (c) and on the further ground

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that there is no proof that either of these defendants

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has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

6. Exhibits 72, 78 and 79, offered under the heading "Paramount's Answers to the Government's Interrogatories—Distribution—1939 Answers."

These defendants move to strike these exhibits upon the ground that (a) they are irrelevant and immaterial to any issue in this case; (b) that they are irrelevant and immaterial to the issues of divorcement and dissolution; (c) and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

7. Exhibits 80-83, offered under the heading "Paramount's Answers to the Government's Interrogatories—1945 Answers."

These defendants move to strike these exhibits upon the grounds that they are irrelevant and immaterial to any issue in this case and are irrelevant and immaterial to the issues of divorcement and dissolution.

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being merely lists of Paramount's feature pictures released and film rentals received in certain selected cities without any basis being laid for the selection of such cities or for the selection of the 1943-4 season, and the cities selected have been arbitrarily so selected simply upon the basis of population; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monop-

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lize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

8. Exhibit 84, offered under the heading "Paramount Answers to the Government's Interrogatories—Admission of Facts—1945."

These defendants move to strike this exhibit on the ground that it is irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, being merely Paramount's admissions of facts with respect to first-run distribution in certain cities arbitrarily selected by the plaintiff upon a basis of population, without any basis being laid for such selection, and upon the ground that they state facts with respect to certain arbitrarily selected motion picture seasons,

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without any basis being laid for such selection; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

9. Exhibit 85, offered under the heading "Paramount's Answers to the Government's Interrogatories—History—1939 Answers."

These defendants move to strike this exhibit upon the ground that the evidence therein contained is irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize,

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or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

The foregoing exhibits are simply statements as to the history of Paramount and of its acquisition of certain other producing, distributing and exhibiting companies or stock interests therein. In view of the fact

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that the plaintiff does not complain that any of these acquisitions were illegal, this evidence is wholly irrelevant and immaterial.

10. Exhibits 151 and 152, 161, 162, 165—167 and 169, offered under the headings "Tabulations of Theatres Owned by Paramount Prior to 1938," "1945 Theatre List Furnished by the Producer-Exhibitor Defendants" and "Information as to Theatre Interests and Extent of Affiliation with Defendants Furnished by Non-Defendants."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and are irrelevant and immaterial to the issues of divorcement and dissolution, being simply lists of theatres in which Paramount had some interest as of arbitrary dates and letters from companies in which Paramount has some stock interests, without any basis being laid for the selection of dates or the selection of corporations; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

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11. Exhibits 172, 173, 174, 175, 177, 178, 179 and 180, offered under the heading "Representative Master Licensing Agreements between the five Producer-Exhibitors covering the 1936-1937 season."

(741)

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, being simply certain licensing agreements, without any basis being laid for the selection thereof and no proof that they are representative or typical, and without any basis being laid for the selection of the period covered thereby; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

12. Exhibits 195, 196 and 198, offered under the heading "Representative Master Licensing Agreements for the Exhibition of Films Released by United Artists, Universal and Columbia, etc."

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These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues of this case, and irrelevant and immaterial to the issues of divorcement and dissolution, being simply certain agreements for the exhibition of pictures in arbitrarily selected theatres in which Paramount has directly or indirectly some stock interest, without any basis being laid for the selection of such agreements, or any proof that they are representative or typical, and without any basis

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being laid for the periods of time covered thereby; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

13. Exhibits 205, 206, 207, 208, 209, 215, 218, 221, 222, 224, 225, 226, 232, 233 and 236, offered under the heading "Theatre Pooling Agreements, etc."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, and upon the ground that they are arbitrarily selected agreements, without any basis being laid for the selection, and there being no proof that they are representative or typical, and upon the further ground that there has been no proof of any combination of conspiracy to which these defendants are or either of them is a party, and none of these agree-

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ments tends to prove any such combination or conspiracy; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

14. Exhibits 240, 241, 242, 243, 244, 250, 251, and 255, offered under the heading "Representative Film Licensing Agreements between the Producer-Exhibi-

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tor Defendants Covering Feature Films released During the 1943-1944 Season."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, and upon the further ground that they are arbitrarily selected agreements covering arbitrarily selected theatres and theatre situations without any basis being laid therefor; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or

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combination or conspiracy.

15. Exhibits 261, 267 and 273, offered under the heading "Licensing Agreements between United Artists, Universal and Columbia and the Manager-Producer-Exhibitor Defendants Covering Feature Films Released during the 1943-1944 Season."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, and that they constitute arbitrarily selected parties for an arbitrarily selected season, without any basis being laid for any such selection; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

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16. Exhibits 279 and 280, offered under the heading "Representative Printed Forms of Feature Licenses."

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement, and that they constitute mere forms of agreement used in arbitrar-

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ily selected motion picture seasons; and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

17. Exhibits 350-354, 360, 361, 363, 367 and 368, being letters from various companies in which Paramount has some stock interest.

These defendants move to strike these exhibits upon the ground that they are irrelevant and immaterial to any of the issues in this case, and irrelevant and immaterial to the issues of divorcement and dissolution, and that they constitute merely letters from arbitrarily selected corporations, without any basis being laid for such selection, and on the further ground that there is no proof that either of these defendants has monopolized, or attempted to monopolize, or combined or conspired to monopolize the motion picture business, or any part thereof, and that none of said exhibits tends to prove any such monopolization attempt or combination or conspiracy.

William F. Rodgers—By Defendant—Direct

(746)

New York, October 23, 1945;
10.30 o'clock a. m.

Trial resumed.

WILLIAM F. RODGERS, resumed the stand.

Direct Examination continued by Mr. Davis:

Q. Referring to the list of towns which you discussed on yesterday; Mr. Rodgers, are there any corrections or additions you want to make to what you said on that subject?

A. There are several corrections that I would like to make. I would like to apologize for three errors that have been called to my attention. One of them was in, I believe, Tacoma, where I had listed as John Hamrick Theatres as being associated with the Fox West Coast, whereas I find that they are independently operated by John Hamrick; another instance I mentioned in Indianapolis, where I believed that the Paramount Company were interested in theatres, I find that they are operated by an independent, Harry Katz; and in the case of Cambridge, Mass., instead of—

Q. Just a moment, about Indianapolis. A. Sir?

Q. Does that refer to the theatres that are listed here under the name of Fourth Avenue Amusement Company?

(747)

A. That is in Indianapolis, yes.

Q. Those are operated by an independent? A. Harry Katz, yes. And in Cambridge, Mass., where I inferred or stated that the house was operated—we sold first-run to Mr. Sumner up there, I find that that is a second-run in that vicinity. So those three corrections I should like to make.

Q. Do you sell any first-runs in Cambridge, Mass.? A. Yes, sir, we sell it to M. & P.

William F. Rodgers—By Defendant—Direct

Q. Do you sell to M. & P. first-run at the Central Square and to S. Sumner second-run at the University? A. Yes.

Q. Have you any other corrections you want to make? A. Not that I know of, no.

Q. You told us that there are 101 towns and cities in which you sold first-run to an independent although there was an affiliate competing in that town or city. A. Yes; I said in the neighborhood of a hundred.

Q. Have you prepared a list of those towns and cities? A. Yes, sir.

Mr. Davis: I offer in evidence schedule of the cases of our product to independent in opposition to co-defendants; and another tabulation, cases where Metro product is divided between independents and co-defendants. Copy has been furnished to the Government.

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Mr. Wright: We have no objection.

(Four sheets marked Defendant Loew's Exhibit L-5.)

Q. Have you prepared or caused to be prepared under your direction from the books of the company tables showing the division of total domestic feature film revenue received by Loew's from all exhibitors for the fiscal years 1936 to 1944 inclusive, showing the proportion of the receipts taken from Loew's own theatres, from Fox, Paramount, RKO and Warner respectively, and from non-defendant theatres? A. Yes, sir, I have.

Q. Do you identify this as such a tabulation (handing to witness)? A. Yes, sir, I identify it.

Mr. Davis: I offer that in evidence. Perhaps your Honors will want to see it at the bench.

(Marked Defendant Loew's Exhibit L-5.)

William F. Rodgers—By Defendant—Direct

Q. There is one phrase which I find here from time to time that you did not define yesterday. What are key runs?

A. Well, key runs, according to my ideas, are the more important localities in each exchange area from which following runs key from. I don't know offhand how many there are, but we don't use numerals, we don't use even populations, but what we consider as important communities or important cities or towns in each geographical branch territory are considered by us as key runs. And then—

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Q. Just a moment. Let me understand you. Is a town accepted as a key run or are theatres accepted as key runs?

A. Well, I more or less consider the theatre as the key run, for the reason that we are doing business with a certain theatre; but on the other hand, if I were doing business with another theatre, the probabilities are I would consider the town or locality, just as I do in larger cities; I will consider runs after the so-called second-runs, what we call key runs. The next important runs after the second-runs in large cities are called key runs.

Q. What is the significance of the words "key run"?

A. Well, "key" means important to me; from which centers or from which theatres important revenue is received.

Q. And what use is made of that importance? A. Well, they all go to help us determine the eventual value of a picture, its exhibition values.

Q. Then they are important from the standpoint of the drawing power of the film? A. Exactly, sir.

Q. Are all your feature pictures, newsreels and shorts copyrighted before they are released? A. Yes, sir.

Q. You showed us yesterday on the form of contract a line where the films were allocated to brackets, first, second, third, and so forth, which you told us was your estimate at the time of the release of the drawing power of the film.

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William F. Rodgers—By Defendant—Direct

You also told us that when you were mistaken in that it was afterwards corrected. Is that your general policy? A. That is a published policy of ours, yes, sir.

Q. Who determines when those corrections shall be made?

A. I or one of the sales managers working with me, or our district managers, or even our branch managers have full authority in the field to adjudicate those designations at any time that they are satisfied that they should be changed.

Q. Have you given sales managers any general instructions to that effect? A. Yes, sir; we published such instructions.

Q. How have you published such instructions? A. In our house organ and in various talks and communications we have had with our field office.

Mr. Wright: If the Court please, I suppose we might as well have the instructions rather than his testimony as to what is in them.

Mr. Davis: I was about to offer them, Mr. Wright.

Mr. Wright: All right.

Mr. Davis: I was just edging up to it.

Q. I show you a magazine bearing the title "The Distributor" dated July 12, 1945, and ask you what this is? A. That is an issue of our house organ, "The Distributor," dated July 12, 1945.

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Q. I notice on pages 6 and 7 of that magazine the 2-page spread headed "The M-G-M Policy." Did you formulate that? A. Yes, sir.

Q. Did you issue that to your distributors and sales managers and salesmen? A. Yes, sir.

Q. Does it express the policy of Loew's, Inc. with reference to the subjects with which it deals? A. It does.

Mr. Davis: I offer that in evidence.

William F. Rodgers—By Defendant—Direct

Mr. Wright: If the Court please, it is obviously a self-serving statement prepared for the purposes of the suit.

Judge Hand: We will admit it.

Mr. Davis: I admit the self-serving character.

(Marked Defendant Loew's Exhibit L-6.)

Q. You told us yesterday about this rotation of films. I want to make that perfectly clear. After the film has been exhibited by the theatre to which it is licensed, what becomes of it? A. After it has completed all of its exhibitions, I assume?

Q. Well, after it has completed its several contracts, what does the exhibitor do with it when his contract term has expired? A. He returns it to our branch office or exchange, as we call it.

Q. What does your branch office or exchange then do with it? A. Well, we keep film for a period of years for (752)

emergency purposes, but it is all maintained in our exchange for at least two to two and a half years; and they keep all positive prints there returned by the last exhibitor that has played it under the terms of his contract.

Q. What happens when the film is finally worn out?

A. Well, at the time the film is finally worn out they are all mutilated and returned—generally speaking I imagine they are returned to the manufacturer or someone else who can salvage something from the positive stock, the nitrate of silver, or whatever ingredients there are; but they are all mutilated.

Q. Why is that? A. So there is no chance of their falling into unauthorized hands.

Judge Bright: Mr. Davis, in this Exhibit L-5 there are some statements or columns headed "Saenger Replacements" and "Theatre Service Replacements."

William F. Rodgers—By Defendant—Direct

Mr. Davis: I do not hear your Honor.

Judge Bright: In this Exhibit E there are columns headed "Saenger Replacements" and "Theatre Service Replacements." Will you explain those, please?

Mr. Davis: I will ask the witness to explain that.

The Witness: These are places where they have sold in opposition to the theatres that are now controlled by the Saenger interests.

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Q. And who are the Saenger interests? A. Sir?

Q. Who are the Saenger interests? A. They are associated with Paramount.

Q. And these theatres that you have listed here are the theatres competing with the Saenger interests? A. Yes, sir.

Q. And you are selling to them now in preference to the Saenger? A. Yes, sir.

Mr. Davis: Does that answer your Honor's question?

Judge Bright: Then there is another column right underneath that.

The Witness: The "Theatre Service Replacements"? Well, the Theatre Service is an organization that is booked by the Saenger people. How much interest they have in it, I don't know, but they did handle all the bookings; and if you do business in the theatres that they operate you do it through the Saenger Company; and not being able to do business with the Saenger Company in any of their holdings, these are the theatres that we sold against those theatres that are considered the Theatre Service Company, I believe. And we have sold them in opposition to the Theatre Service Company, the Theatre Service booking organization. I just don't know what the correct corporate name is.

William F. Rodgers—By Defendant—Cross

Judge Bright: And there is another.

The Witness: There is another one here called the

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United Theatre Replacements. Now, the United Theatre Replacements is also an organization that is controlled by the Saenger Company in New Orleans, and these are the theatres that we sold in opposition to the ones that the United Theatres booked or handled.

Q. Can you tell me, Mr. Rodgers, whether the Theatre Service is connected with Paramount? A. Well, the Paramount representative handles all of the business for the Theatre Service. I don't know to what extent they are associated with Paramount, but a Paramount representative in their offices handles the business completely.

Q. But you know nothing of the relationship between them? A. No, sir.

Mr. Davis: Are there any other questions on this?

Judge Bright: No.

Mr. Davis: Do any of my colleagues want to ask the witness any questions?

Mr. Seymour: I have a few.

Cross Examination by Mr. Seymour:

Q. Mr. Rodgers, with reference to this last matter that you just mentioned where you referred to Theatre Service and United Theatres in New Orleans, you said the Paramount representative bought for those theatres. A. E. V. Richards, yes, sir, is the supervising representative there.

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Q. Mr. E. V. Richards is connected with the Saenger Circuit? A. Yes, sir.

Q. Paramount has an interest in that, but do you personally know of any interest that Paramount has in this United Theatres or Theatre Service? A. No, sir.

William F. Rodgers—By Defendant—Cross

Q. So that was just your own inference; you had no basis for saying that Paramount's representative bought except that it was Mr. Richards, who is also interested in the Saenger Circuit? A. That is right.

Q. Now, I have a couple of other questions: Where does the Loew distribution department negotiate for the licensing of Metro pictures in theatres in which Paramount has an interest? A. In the various territories where their representatives are located.

Q. That is, those negotiations are conducted in the field? A. Yes, sir.

Q. And, for example, in connection with the theatres managed by M. & P. in New England, are those negotiations conducted in the offices of the M. & P. in Boston? A. Either in their office or ours in Boston, yes, sir.

Q. And, for example, in connection with United Detroit Theatres, are the negotiations conducted in Detroit? A. Always.

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Q. So that in each case of the licensing of Metro pictures in theatres in which Paramount has an interest, the negotiations are conducted at the office or in the city where the operator or manager of the group of theatres is, is that right?

A. That is correct.

Q. They are not conducted at all through the Paramount theatre department? A. No, sir.

Q. Are the negotiations for the exhibition or the licensing of Metro pictures in theatres in which Paramount has an interest conducted by representatives of the distribution department under your general supervision? A. Either general representatives or myself, yes, sir.

Q. At the time of those negotiations, that is, negotiations for the exhibition of Metro pictures in theatres in which Paramount has an interest, do you have any knowledge or information as to negotiations or arrangements for the exhibi-

William F. Rodgers—By Defendant—Cross

tion of Paramount pictures in theatres in which Loew has an interest? A. None whatever.

Q. Do you know with whom Loew negotiates for Paramount pictures in Loew theatres? A. I couldn't answer that definitely, no, sir. I don't know.

Q. By whom are those negotiations for Loew conducted?

A. By either Joseph Vogel or Charles Moscovitz.

Q. Are those gentlemen in the Loew theatre department?

A. Yes, sir, both of them.

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Q. Do you have any connection whatever with those negotiations? A. None whatever.

Q. Is there any relationship whatever between the negotiations or arrangements for the showing of Paramount pictures in Loew theatres and the licensing of Metro pictures to theatres in which Paramount has an interest?

Mr. Wright: If the Court please, that is much too broad for him to answer, as to whether there is any connection whatever.

Mr. Seymour: This is a factual matter in which the Government—

Mr. Wright: It is simply his conclusion, and the conclusion which the Court can draw.

Judge Hand: Yes, there are a good many conclusions on both sides. Go ahead and answer it.

A. No, sir.

Mr. Davis: Any other questions?

Mr. Caskey: I have a few.

By Mr. Caskey:

Q. Mr. Rodgers, you testified yesterday that you license your pictures in Kansas City, Missouri, to the Midland Theatre? A. Yes, sir.

William F. Rodgers—By Defendant—Cross

Q. Does that theatre take clearance over the theatres in Kansas City, Kansas? A. Priority? Yes.

Q. Your theatre in Kansas City, Missouri, plays ahead (758)

of the theatres in Kansas City, Kansas? A. Yes, sir.

Q. Have you informed yourself since yesterday as to whether Fox Midwest has any interest in the Electric Theatre in Kansas City, Kansas? A. No, I have not. I neglected to do that. My attention was called to the fact that there was an error made but I did not get a chance to investigate it.

Q. Where is Kansas City, Kansas? A. It is right across the river from Kansas City, Missouri.

Q. And the so-called first-run theatres in Kansas City, Kansas, are within a mile of the Midland Theatre? A. Very close.

Q. In referring to Denver, Colorado, you have referred to certain theatres as being operated by Fox Midwest Theatres. Do you know who the operator is? A. Yes, Mr. Ricketson.

Q. That is Frank H. Ricketson, Jr.? A. I believe that is his name.

Q. You have known him for some years? A. Many years.

Q. To your knowledge he has the operation of the theatres in Denver? A. All that area, yes, sir.

Q. And has an office in Denver for that purpose? A. Yes, sir.

Q. Do you know the name of the corporation? A. I couldn't tell you the name of the corporation, no. I mean, (759)

I don't recall it.

Q. You testified that the Orpheum was the best theatre in Denver. Are you familiar with the Denver theatre? A. I have been in it.

Q. And the Paramount theatre? A. Yes, sir.

William F. Rodgers—By Defendant—Cross

Q. If Mr. Ricketson were to testify that in his opinion they were the best theatres in Denver, would you be disturbed? A. Not at all. They may be for his purposes, but I consider the Orpheum as best for ours.

Q. The Denver and the Paramount are large de luxe theatres? A. Very good theatres.

Q. Centrally located? A. Yes, sir.

Q. In Detroit are you familiar with the Fox Theatre? A. Yes, sir.

Q. What class of theatre is it? A. It is a beautiful, fine theatre.

Q. And comparable to the Michigan Theatre? A. Yes.

Q. In Spokane, you said that three theatres were operated by Evergreen and that there was a theatre called the Granada, which was not of the same class?

Mr. Caskey: I would like to have these marked for identification as Fox Exhibits A, B, C and D.

(Marked Fox Exhibits A, B, C and D, respectively, for identification.)

Q. Calling your attention to Fox Exhibit A for identification (760).

tion, the Fox Theatre in Spokane, is that the largest theatre in Spokane? A. I believe so.

Q. And it is the theatre in which the best Loew pictures are played first-run? A. Yes, sir.

Q. Will you look at the picture of the Granada, whatever legend it bears? A. Yes.

Q. Have you ever played any pictures in the Granada? A. I cannot recall that we have, but I couldn't say definitely.

Q. From your experience in the motion picture business are you able to say without having played any pictures in the Granada, whether the revenue possibilities of a picture played in the Granada are equal to those of the Fox? A. That is quite obvious, that they could not be.

Colloquy

Mr. Caskey: I offer in evidence the photographs of the four theatres in Spokane.

Mr. Wright: If the Court please, I see no reason why the record should be encumbered with photographs of this character. There isn't any dispute about the fact that there are different kinds of theatres in all of these cities, some of them big and large, some of them small, and they all have different appearance. I haven't the faintest idea of what that proves.

Judge Hand: What, really, is the object of piling in this stuff?

(761) Mr. Caskey: I do not propose to pile it in, but the object is to answer the inquiry which Judge Bright made yesterday as to whether or not an experienced distributor could know the revenue possibilities of a theatre, which he had not exhibited any pictures in, and I want to show that from the very appearance of the theatres that anyone would know that the Fox Spokane is infinitely superior to the Granada Theatre. I do not propose to have an illustrated book of every theatre in the United States, although that in itself might be instructive.

Judge Hand: Not for me. I think we will rule these things out. I think we are getting the case too complex and burdensome for anybody. Things like this we will never look at, you know. I can give you that firm assurance if you want it—the three of us.

Mr. Caskey: If Mr. Wright will give me the firm assurance that he will never contend that the Granada Theatre is a satisfactory outlet for Fox Pictures, I will be content.

Judge Hand: Does he make any such contention?

William F. Rodgers—By Defendant—Cross

Mr. Caskey: I don't know.

Mr. Wright: If the Court please, I expect to develop through cross examination that the question of what is a satisfactory outlet has very little to do with the physical characteristics.

(732)

Judge Hand: You do not have to develop cross examination just to investigate; just for fun. There is no pleasure for us in it.

Mr. Wright: I say, I think I can persuade—

Judge Hand: Unless you have some definite purpose in it. I deprecate enormously this building up of records in cases of this type. I have said so times without number. We will exclude this.

Q. Mr. Rodgers, in licensing pictures to theatres operated by Fox West Coast Theatres Corporation, with whom do you deal? A. We deal with a number of individuals.

Q. Principally? A. Well, you have zone managers in various sections.

Q. I am talking now about Fox West Coast Theatres, the California— A. That is, the California structure entirely?

Q. Yes. A. My original negotiations were first with Charles Skouras.

Q. And then with whom? A. With various of his associates, with Zabel and others.

Q. In the licensing of Metro pictures to the theatres of the Fox West Coast Theatres, has Mr. Skouras or his associates ever conditioned or attempted to condition the licensing of the Metro pictures upon the Loew theatres licensing the Fox pictures? A. No, sir.

(763)

Q. Have you ever attempted to condition the licensing of Metro pictures to the Fox West Coast Theatres—

William F. Rodgers—By Defendant—Cross

Mr. Wright: Same objection to this line of inquiry that we made before. He is talking in terms of conclusions that the court has to draw.

Judge Hand: Overruled.

Mr. Caskey: I am sorry, I did not finish my question.

Q. (Question read.) —upon Fox licensing its pictures to the Loew theatres? A. I have nothing whatever to do with that, no sir.

Q. Has the subject ever been discussed? A. Never.

Q. Is the same true as to the National Theatre groups which are operated out of Seattle? A. Same answer would apply there.

Q. And Denver? A. Yes, sir.

Q. And Milwaukee? A. Yes, sir.

Q. And Kansas City? A. Same thing.

Q. In negotiating the licensing of your pictures, have you ever conditioned the licensing of the pictures to the California group upon any or all of the theatre groups in Seattle, Denver, Milwaukee or Kansas City licensing the pictures? A. To the contrary, deal only for the individual territory individually.

Mr. Wright: Same objection.

(764)

Q. And has any one of those groups conditioned the licensing of Metro pictures upon your licensing the other groups? A. No, sir.

By Mr. Raftery:

Q. Mr. Rodgers, there are eight distributor defendants—

Judge Hand: Wait a minute. Are there any more of the so-called—

Mr. Van Bergh: I have two questions for the Warner.

William F. Rodgers—By Defendant—Cross

By Mr. Van Bergh:

Q. Mr. Rodgers, approximately how much film rental did the Warner theatres pay Loew's in the 1943-44 season? A. I can't remember that exactly.

Q. Would it refresh your recollection if I suggested the figure of \$5,800,000?

Mr. Davis: Where is the exhibit? I think we have that exactly.

A. It might.

Q. Would you say approximately that was in the range?

A. I couldn't say that because I deal with a lot of figures and I would have to see.

Judge Hand: I thought you had an exhibit stating it.

The Witness: But I think that was by years, over a period of years.

(765)

Judge Hand: The clerk says it has not been received. I thought it was in evidence.

Mr. Davis: I offer it.

Judge Hand: All right, received.

Mr. Davis: If the clerk will give it a number, so Mr. Van Bergh can refer to it.

(Marked Defendant Loew's Exhibit L-7.)

Q. Mr. Rodgers, Loew's Exhibit L-7 indicates that the figure is \$3,731,208. So it is approximately \$3,700,000. A. But I understood you to say five million.

Q. That is right, I did say that. A. Because I didn't think so, but I was hopeful that I would be agreeably surprised.

Q. Mr. Rodgers, approximately how much film rental—

Judge Bright: Is that for any one year?

The Witness: 1943-44, \$3,731,000.

William F. Rodgers—By Defendant—Cross

Q. Will you tell us approximately how much film rental the Loew theatres paid to Warner in the same year? A. I haven't the slightest idea.

Q. Would it surprise you if I told you \$200,000? A. I haven't any feeling in the matter because I don't know.

Mr. Van Bergh: All right, thank you; we will prove it some other way.

Judge Bright: Mr. Rodgers, in your licensing practice with the defendants, do you use the same
(766) form of license that you do for independents?

The Witness: I should say yes, sir, in most cases, if not in all cases. There are some times when there are a number of theatres that are operated by the defendants in any area, we may use this one form of contract and have annexed to it the various theatres represented, but in all cases we use our same form of contract with the defendants as well as the individuals.

Judge Bright: Has that been so over the period of the last ten years?

The Witness: Yes, sir.

Judge Bright: That there is a uniform license agreement which is used for all theatres?

The Witness: Yes, sir.

Judge Bright: No matter with whom they are affiliated?

The Witness: That is true, yes, sir. I might add there, with the exception of our own theatres. We do not always execute agreements block by block with our own theatres, but with all the defendants and all the individuals we use the same style and form of contract.

Judge Bright: Who determines whether a theatre shall be a first-run, a second-run or subsequent-run pictures?

William F. Rodgers—By Defendant—Cross

(767) The Witness: Well, generally speaking, our branch

managers and district managers in the field, and it has been more or less historical, except for new theatres that come on the picture. Very little clearance or availability has been changed over a period of years.

Judge Bright: Who determines it where there is any question about it?

The Witness: Generally speaking, our branch managers make their recommendation to the district manager, and if there seems to be the slightest question about it at all, the district manager will take it up with the sales manager and, if necessary, bring it to my attention for decision.

By Mr. Leisure:

Q. Mr. Rodgers, you testified yesterday concerning the licensing of certain of your pictures in RKO theatres, did you not? A. Yes, sir.

Q. In doing so, with whom did you deal? A. Well, I personally haven't dealt very much with RKO in the last several years, but my assistants deal with a Mr. Mirich.

Q. In licensing these theatres of RKO, were they ever conditioned in any way upon the showing of RKO pictures in theatres owned either by Loew's or theatres affiliated with Loew's? A. No, sir.

Mr. Wright: Same objection.

Mr. Leisure: That is all.

(768)

By Mr. Raftery:

Q. Mr. Rodgers, in addition to the eight distributors here, national distributors, are there any other national distributors in the United States? A. Yes, sir.

William F. Rodgers—By Defendant—Cross

Q. Will you name them? A. I believe Monogram Distributing Corporation, or Distributing Company; there is a P.R.C. Distributing Organization; and, in addition, a Republic Distributing Organization. I don't know their corporate names, but they are the principal three.

Q. They are generally known in the trade as Republic, Monogram and P.R.C.? A. Yes, sir.

Q. And each of those companies have studios in Hollywood? A. Yes, sir.

Q. Republic has a large studio at Studio City, isn't that right? A. Yes.

Q. Modern, large studio? A. It is not as large as ours but it is large.

Q. We will admit yours is the largest. Now they have a national distributing organization, have they not? A. Yes, sir.

Q. Have had for many years? A. For some years, yes, sir.

Q. They are affiliated with a laboratory? A. That I don't know.

Q. Well, you have heard of Consolidated Laboratories? (769)

A. I have heard of them but I do not know it to be a fact.

Q. It is generally considered in the trade that they are affiliated in some way with a laboratory, is that right? A. So I have heard.

Q. And they produce a great number of pictures at Studio City and distribute them nationally? A. More than we do, yes.

Q. And more than United Artists, is that right? A. Yes.

Q. And more than Universal? A. That I don't know.

Q. Well, as many as Universal? A. I should say approximately, anyhow.

Q. And they license the exhibition of their pictures in competition with your pictures? A. Yes, sir.

William F. Rodgers—By Defendant—Cross

Q. To these defendants and to independent exhibitors?

A. They are in open competition with us, yes, sir.

Q. And they use generally the same manner of means of distribution that you described yesterday to Mr. Davis?

A. I should say generally, yes.

Q. They have a sales manager, Mr. Grainger, have they not? A. Yes.

Q. Mr. James Grainger, well known in the trade, is he not? A. Very well.

Q. Been in the business as long as you have been? A. Longer.

(770)

Q. In addition to that, P. R. C. have a studio in Hollywood, have they not? A. Yes.

Q. On Santa Monica Boulevard? A. I have never been in it but I know where it is.

Q. You know where it is, and it has been there a good many years, that particular studio? A. I don't know whether they have operated it a good many years but it has been there for a long time.

Q. And they distribute pictures nationally? A. Yes, sir.

Q. And sell them to the affiliated and non-affiliated? A. Yes, they sell them all over.

Q. And the same applies to Monogram? A. Yes.

Q. They have a studio, have they not? A. They do.

Q. Produce pictures? A. Yes.

Q. And distribute them nationally? A. Yes.

Q. Exchanges all over the country? A. That is true.

Q. In addition, you have other distributors in this country besides the eight here and the three you just mentioned?

A. I don't think we have other national distributors.

Q. Well, they may be regional? A. That is true.

(771)

Q. That is, they operate in part of the United States? A. Yes.

William F. Rodgers—By Defendant—Cross

Q. But the pictures get circulation throughout the entire United States, do they not? A. I imagine they do.

Q. And numerically they handle a great number of pictures? A. Well, I could not say that, Mr. Raftery, because I have not looked into the number that they handle; whether there is a large number or a small number, I do not honestly know.

Q. Well, yesterday you mentioned a Mr. Blumenfeld in answer to or in colloquy with Judge Bright. Mr. Blumenfeld is an exhibitor operating in opposition to Fox West Coast? A. That is true.

Q. And in your opinion Fox West Coast is a better customer for you? A. That is true.

Q. Now, some here may not share that opinion with you, is that right? A. Definitely.

Q. Well, Judge Proskauer's client might not share that opinion with you? A. Maybe not for their purpose, I don't know.

Q. Well, you will admit Mr. Blumenfeld is a good showman? A. Very good showman.

Q. And he gives Fox West Coast good, stiff competition wherever he operates? A. Good operator.

(772)

Q. And you have no quarrel with any of these defendants who prefer to do business with Mr. Blumenfeld? A. I have no quarrel with anyone.

Q. In this license agreement that Mr. Davis handed you yesterday, is that a license where you license the exhibition rights to a theatre exclusive in that theatre? A. That license agreement covers the license agreement to exhibit the picture in that theatre and that theatre alone, yes.

Q. And that exhibitor cannot sell or assign that license to anybody else, can he? A. Not without our approval, I don't believe.

William F. Rodgers—By Defendant—Cross

Q. So when you make a license agreement for the exhibition of your picture in the Capitol Theatre in New York City under the agreement that was put in here yesterday, that picture must be exhibited in the Capitol Theatre and in the Capitol Theatre only? A. Yes, sir.

Mr. Raftery: That is all.

Cross-Examination by Mr. Frohlich:

Q. Mr. Rodgers, would you please define block-booking?

A. Well, we have got away from block-booking for so long that I hesitate to define it other than to say that it has generally been accepted as the sale of a season's output of pictures at one time. However, that is not booking; that is licensing; but it has been referred to as block-booking.

(773.)

Q. Now, you have been in this business for about 30 years, haven't you? A. 35.

Q. 35? A. Yes, sir.

Q. Can you tell us when block-booking began to be indulged in by these companies? A. Well, my first experience in selling a number of pictures at one time was with the Goldwyn Company in 1917, I believe, when I first went with them. At that time, as I recall, we sold in two fashions: We planned to make 26 pictures in a year, and we would sell either a six month's supply or a year's supply; 13 or 26 pictures. Prior to that time we used to sell pictures in the old General Film Company per day or per week; but my first experience in selling a group of pictures at one time was in 1917, I believe.

Q. Didn't you state-right your pictures in the early days?

A. I was never identified with the state-right organization, but there were others who did, yes.

Q. Well, don't you know that most of the companies who made their pictures in quantities did state-right their pictures for many years? A. No, I don't know that.

William F. Rodgers—By Defendant—Cross

Q. Do you know when the practice of state-righting ceased? A. I could not tell you that either?

Q. Did Goldwyn state-right his pictures at any time?

A. At the inception of the Goldwyn Company before he had (774)

commenced his distributing company he had gone into the producing of pictures, and I believe that he had made an arrangement with Jones, Linnick & Schaefer for the distribution of his products in the midwest area, and he had made another arrangement with Alfred Weiss for the distribution of pictures in New York State; but that was as far as he ever went in the state-right field, and they were never supplied; but he made some sort of an arrangement whereby they came into his distributing company which he later formed, and he never supplied pictures under a state-right basis.

Q. Did Metro-Goldwyn-Mayer sell its pictures in block for an entire season to the exhibitors of the country? A. Yes, sir, for many years.

Q. And that took place all the way down to 1940 when you had the consent decree, isn't that right? A. Yes, sir.

Q. Did you find that a profitable method of exploitation of your pictures? A. We have been profitable for many years.

Q. You made a lot of money with it, didn't you? A. Well, I don't know what you call a lot of money. We were profitable.

Q. Well, you found it an excellent method of disposing of your product each year, didn't you? A. It served its purpose then, yes.

(775)

Q. Have you found the new system of selling pictures in blocks of five more profitable than the old system of book-blocking? A. Well, I can't answer that, whether it has been more profitable or not. I am not prepared to say. We happen to be more profitable. I don't know whether it is attributable to that.

William F. Rodgers—By Defendant—Cross

Q. Did you find any complaints from the exhibitors with your five block pictures since 1940? A. They complained very bitterly, yes, sir.

Q. Did your exhibitors complain more bitterly since 1940 with your five block pictures than they did with your block-booking prior to 1940? A. Well, I could not say that, no; they have complained a good bit over many years about many matters, and this is another subject on which they can complain; but whether it is more or less I am not prepared to say.

Q. Would you say, Mr. Rodgers, that block-booking was a very healthy and acceptable form of exploitation of pictures over the years? A. Yes, it was very good for those years, yes.

Mr. Frohlich: That is all.

Mr. Davis: Just one correction in the record, if your Honor please: I find on page 475 of the printed stenographic record a question and answer which in some way got off the rail. I read the question:

(776)

"Q. What other persons other than your own theatres, outside of Radio City Music Hall, do you license? A. We have played some pictures with the Globe and the Gotham operated by Mr. Brandt.

"Q. Is he an independent?" and then the answer is not relevant.

Mr. Davis: What is your answer to the question of whether Mr. Brandt is an independent?

The Witness: Definitely, yes.

Judge Bright: Page 475?

Mr. Caskey: Page 679 of the typewritten record.

Mr. Davis: You may inquire, Mr. Wright.

Judge Hand: What is this correction?

Mr. Davis: I could not get an answer to a question which was responsive.

William F. Rodgers—By Defendant—Cross

Judge Bright: What is the question?

Mr. Davis: The question is whether Mr. Brandt is an independent, and then the answer which the record shows does not refer to Mr. Brandt at all. I am just simply trying to get an answer to that question: Is Mr. Brandt an independent? It is folio 679, page 475 of the printed record.

Judge Hand: Yes, I see it. What is his answer?

Mr. Davis: His answer is —

The Witness: Definitely yes, he is.

(777)

Cross-Examination by Mr. Wright:

Q. Mr. Rodgers, there were some of those definitions that were given yesterday that I would like to get cleared up: You defined a road show, I believe, as one where the charge was a dollar or more, \$1.20? A. For the majority of seats at evening performances.

Q. Of course, all of these theatres on Broadway that are playing first-run charge more than that, do they not? A. Well, I believe they are at the present time, but that has only been of short duration.

Q. But those are not road shows? A. No, sir.

Q. The real definition of a road show is that it is a special showing which takes place without reference to the rights of the subsequent-run exhibitors; isn't that correct? A. Well, the subsequent-run exhibitors have no right in the picture until it is leased to them.

Q. Well, a road show is a special first-run showing that takes place prior to the time that you put the picture into regular release into first-run theatres, is that correct? A. It is a special showing, yes, sir.

Q. Your testimony, I believe, was, in response to Mr. Frohlich's question, that your company along with the others sold an entire season's product in a block before it was pro-

William F. Rodgers—By Defendant—Cross

duced up until 1940. That was up until the 1941-1942 season was it not? A. Whenever the consent decree became effective, (778)

whenever that was.

Q. You called that old method of selling—it was known as blind selling and block-booking, isn't that right? A. Well, it was defined by some as that, yes.

Q. Well, the exhibitor never saw the pictures until he bought them, or never had an opportunity to see them, with some exceptions, is that right? A. Lots of them had the opportunity if they wanted to, but they did not go.

Q. And the only season in which you were compelled by decree to sell in particular blocks or to trade show was the 1941-1942 season, was it not? A. If that is the year when the consent decree become effective, yes.

Q. I say, that insofar as its requirements were concerned, that applied only to the year 1941-1942? A. Is that when it became effective?

Q. As far as you know. A. Yes.

Q. And since the subsequent seasons you have pursued that method of selling voluntarily, have you not? A. That is correct.

Q. And you have, then, sold in those blocks simply because you found it more profitable to do business that way, isn't that right? A. Not necessarily.

Q. Well, in any event— A. We have sold that way.

Q. You have sold that way? A. Yes.

Q. And not through any compulsion that is in the decree? (779)

A. No, except that we wanted to respect it. Why?

Q. No, I did not say why. A. I thought you did.

Q. You do not mean to suggest that there was any provision compelling you to sell that way? You merely wanted to continue the practice that you had been forced to adopt for the one season, isn't that right? A. There was nothing to compel us to do so lately, that is true.

*William F. Rodgers—By Defendant—Cross**By Judge Bright:*

Q. You mean that since the decree went into effect you have been confining your block selling, or so-called block selling, to five or less pictures? A. Yes, sir.

Q. There has been no blind selling? A. There has been no blind selling at all.

By Mr. Wright:

Q. And your trade showing of the films before they are released since the 1941-1942 season has been voluntary on your part also, isn't that correct? A. That is true.

Q. And would you say the system has proved in practice perfectly workable and profitable as far as you are concerned? Is that right? A. Yes.

Q. And do you recall the dire predictions that were made at the time it was first suggested that you abandoned season block booking?

Mr. Davis: That is objected to. I do not think we need to go into the dire predictions.

(780)

Judge Hand: No.

Mr. Wright: I think it is significant that this witness's company and this witness himself at that time suggested—made this same sort of suggestions that are being made now, that if you changed that method of doing business it was going to be unworkable and the industry could not possibly function. Now he has made the same suggestions about this loss of theatres.

Judge Hand: Well, he may answer that, but I do not think his criticisms at one time and those which he has now have any bearing on these issues.

Mr. Wright: Read the question.

(Question read.)

William F. Rodgers—By Defendant—Cross

A. Yes, I recall it, but I do not ever remember saying that I considered it would be unworkable as you expressed it. It is workable, but it is a great hardship on everybody in the business.

Q. Well, your organization filed a brief, did it not, before the committee that was holding hearings on legislation to abolish blind selling and block-booking, do you recall that?

Mr. Davis: Objected to.

Judge Hand: Sustained.

Q. Now, I do not believe you defined, did you, on your direct testimony what is called a move-over first-run?
(781)

A. I don't recall that it was asked, no.

Q. What is a move-over or continued first-run? A. Well, a move-over first-run is a picture that has been playing at one theatre that is moved into another theatre for a continued run.

Q. That is, there is no interval of clearance elapsing between the two runs? A. Not as a move-over.

Q. And your practice today and for the last couple of years has been to move pictures ~~over~~ rather freely in the metropolitan centers from one theatre to another, isn't that correct? A. In a number of places, yes.

Q. Without any clearance intervening at all? A. So long as the admission prices in the second theatre are identical to the first.

(782)

By Judge Bright:

Q. Is a move-over from a first-run theatre still considered a first-run? A. It is, generally speaking, operating as a first-run theatre, but it is moved in.

Q. Does not prolong the time of the second-run theatres to show the picture every time there is a move-over? A. It

William F. Rodgers—By Defendant—Cross

prolongs the showing or defers the showing until after the conclusion of the second theatre. If a picture is to be played four weeks in one theatre, it would not become available to the next run until the period after its conclusion. So whether it shows one week in one or three weeks in another, the picture is not delayed.

By Judge Hand:

Q. So it is really all a first-run? A. It is all a first-run.

Q. Even though the time of the two theatres aggregates the same as in one? A. The time in the two theatres sometimes might aggregate more than would be in one, but very often it would not; but that practice has been going on for many years in many places.

By Judge Bright:

Q. You figure the beginning of clearance time from the end of the move-over period? A. Yes, sir.

By Mr. Wright:

Q. Mr. Rodgers, I call your attention to the provision (783) -

in this 1943-1944 license agreement of yours that is in evidence as Exhibit 278, the provision that reads:

"If the run herein granted is other than first, Distributor always retains the right, without violating any right of Exhibitor hereunder, to exhibit or license for exhibition any or all of said pictures as a continued first run (i.e., a run immediately following conclusion of the initial first run and prior to any run except first, with admission prices not less than those of the initial first run) and in such case Exhibitor's availability as to any pictures so exhibited is to be postponed accordingly, and any clearance herein

William F. Rodgers—By Defendant—Cross

provided over the theatre wherein such 'continued first run' occurs automatically modified to authorize such 'continued first run' in such theatre."

Do you remember when it was you first put that provision in the license agreement? A. I haven't got the slightest idea, no, sir.

Q. Do you know it was not in the 1936-1937 agreement?

A. It was not? I don't know.

Q. Don't you recall that the provision was inserted as a result of complaints made by subsequent-run exhibitors about the practice of moving over the films in the first-runs from one theatre to another, extending the playing time and (784)

postponing their availability? A. To be frank with you, I don't remember having ten complaints in five years.

Q. Do you remember that such complaints were made?

A. Oh, there may have been, but not numerous.

Q. You have heard the term "milking" a picture? A. Sir?

Q. You have heard the term "milking" a picture used in the-trade? A. Yes, sir.

Q. And it was suggested that by this practice you were milking the picture of its value by exhausting the exhibition possibilities in those move-over runs before it got down into the subsequent-runs, isn't that right? A. Well, the term milking a picture does not necessarily apply to move-over theatres. It has been used very often where runs in an individual theatre have been extended. They talk about milking a picture when a man plays a picture for a week when he usually plays it only for four days.

Q. But, in any event, there were exhibitors who somehow did not understand that this additional run was just like a first-run and was not actually an additional run at all, according to your ideas, isn't that right? A. I don't recall who they were, but there may have been some complaints, but not many.

William F. Rodgers—By Defendant—Cross

Q. And that problem was resolved by incorporating this provision in your license, isn't that right? A. Well, that I (785)

could not say, Mr. Wright. I don't know whether that was the cause of it.

Q. Then I notice this other agreement that was offered here as Defendant's Exhibit L-1. That represents the latest revision of your license contract, does it? A. Yes, sir.

Q. It has the date marked 1945. Is that when it was revised? A. Yes.

Q. Do you know what the purpose or occasion was for revising the agreement at that time? A. Well, the theatre owners at many times have asked us for a shorter form of contract, and we have been working on it for a good many years. I have been trying to persuade our legal department to take out all paragraphs they did not consider absolutely necessary to properly protect us, and that is the result of it, as far as I know.

Q. Well, do you know what particular changes were made, if any? A. I could not tell you that, no, sir.

Q. I will call your attention to one particular phrase which was omitted from your 1943-1944 agreement, Exhibit 278. The last sentence states of the provision entitled 10th Clearance and Run:

"If clearance is granted hereunder against a specified theatre or theatres indicating it was Distributor's intention to grant such clearance against all theatres in the immediate vicinity of Exhibitor's theatre, then (786)

unless otherwise provided in the Schedule such clearance shall be deemed to apply to and include any theatre hereafter opened in such vicinity."

Mr. Davis: Is that 1944?

Mr. Wright: Yes.

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Q. You recall that was dropped out of the 1945 revision, Defendant's Exhibit A? A. No, sir, I don't recall it.

Q. You don't know why it came out of there or how?

A. I personally participated very little in the reduction of that license form.

Q. This revision was a straight lawyer's job, is that right? A. Well, it was not entirely a straight lawyer's job. My associates, some of them, participated in discussions with our attorneys; but as to the elimination of a particular clause, I could not tell you why it was.

Q. Now, in your direct testimony I believe you referred to clearance as the interval of time that elapsed between the two or more runs? A. That is right.

Q. Now, in so far as it is necessary to establish an interval of time between runs, you do not need any agreement with the first-run exhibitor to do that at all, do you? A. Well, the first-run exhibitor will usually discuss with you what period of clearance he thinks he is entitled to before it is shown in other theatres.

Q. I understand that, but you as a distributor, in so far (787)

as you may find it desirable to stagger runs and protect your revenue in the area by proper staggering, you can stagger those runs on the basis of what you call open booking, with no clearance agreements whatsoever, isn't that right? A. We have some agreements with open booking as runs get later; yes, where two theatres will play the pictures simultaneously, or, at least, they have the same opportunity.

Q. And an example of that, I suppose, is Baltimore where after you get through with your pictures in your first-run theatre and a move-over in your other theatre, it goes into 15 or 20 theatres simultaneously on second-run, doesn't it?

A. No. We have a second-run theatre in Baltimore, and the clearance, incidentally, is very short.

Q. What is the theatre you refer to as your second-run theatre? A. The Parkway.

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Q. So that you in Baltimore play a first-run at what theatre, usually? A. Usually at the Valencia, and Century.

Q. And then a move-over at the Century? A. We don't always move over; but then we play at the Parkway second-run, but we have to play in a very limited time because we have leased, as a general thing, pictures to be played in the neighborhood theatres 21 days after the conclusion of the downtown first-run.

Q. So, then, after you get through with the move-over (788)

first-run and the second-run at the Parkway, then they go into 15 or 20 theatres simultaneously? A. To a number, yes.

Q. And those are all independent theatres? A. In different areas, that is right.

Q. Those simultaneous runs? A. Yes.

Q. And you have as between those theatres what you refer to as open booking, isn't that right? A. Well, some of them do not compete with each other. They are in different zones. They have an availability of blank number of days after the conclusion of first-run, and they do not always have any relation with others. I do not say that we have any contracts that I know of that has so-called open bookings for 15 or 20 runs there, no. I would say they are due a certain time and they all have the same availability.

Q. Just give me a definition of open booking? A. Open booking is usually confined, generally speaking, to two theatres who are not, maybe, in direct competition but who are reasonably close to each other, and the picture is available to both of them at the same time. But that is usually confined to two theatres, when you refer to the term "open booking."

Q. I am just trying to get what the term means. And you do have the practice of having open booking in some of (789)

those situations where the prints become available to both

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at about the same time, and sometimes you move a print into one theatre first, and the next time it may go into the other theatre first, so neither has a fixed playing position in reference to the other. That is what open booking does? A. They have the same opportunity to book at the same time, and if we have the prints available they will get them at the same time.

Q. Yes; and I say, in that case, there is no clearance which gives one a fixed position over the other? A. That is correct.

Q. Now, booking I don't think has been defined. Perhaps you had better tell the Court what booking is as distinguished from licensing, or what you call selling. A. The booking of attractions after we receive the license agreements and the complete approval is had and they become a matter of record, we have in our exchange offices or branch offices, as they are sometimes termed, and dependent upon their size, anywhere from two to eight people who are engaged for the purpose of booking the picture to the theatres in accordance with the provisions in the license agreement. And very often they will send notices to the theatre that a picture is available at a certain time, and the theatre will then come in and book a picture at a time when he can best use it within that period that it is available; or he will write (790)

in. For as brief a description as I could give, I could more or less liken it to the same manner in which many years ago bookers routed vaudeville acts. We routed them all over the country in different theatres. I think we could give an act 30 or 40 weeks in New York by routing it to different theatres. The same thing is followed in booking of motion pictures.

Q. And these so-called bookers of yours in the exchange keep a chart, do they not, not only of the first-runs as they play in your theatres, but the first-runs in all of the theatres

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in the area, isn't that right? A. Well, they don't necessarily keep a chart of the first-runs in the area that are not playing our pictures. Their charts are maintained only for the pictures of ours that are leased.

Q. Well, for purposes of determining what the most advantageous times are to date or what you call setting in these pictures, it is necessary for your booker to know not only what Loew pictures are coming off the first-run, but when and what pictures of other distributors are coming off the first-run; is that right? A. No. I don't believe there is a single chart in any one of our offices maintained by a booking clerk that shows any such data.

Q. Well, whether there is a chart or not, I say, isn't it a fact that your booker in order to do his job properly has to know not only what pictures of yours are being shown first-
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run, and when, but the first-run play dates in the area for the other distributors' films? A. How can—I was just about to ask you a question. But you are asking me.

Q. Can you answer that yes or no? A. I will say no, that we do not maintain such records in our exchanges, or the bookers.

Q. I did not ask you whether you maintained a record. If you will listen carefully to the question— A. Give it to me again.

Q. Isn't it the fact that the booker in your exchange, in order to do his job properly, has to know and observe not only when and what pictures of yours are played in the first run theatres in the area, but when and what pictures of the other major distributors are played in the area? A. No, he does not have to know that.

Q. You say that is not a fact? A. No.

Q. Now, you gave a rather extensive testimony or explanation here as to what you call first-run theatres in these 92 cities of over 100,000 population. I don't believe you de-

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finest first-run theatre. Can you do that for us, as you used it? A. A first-run theatre?

Q. Yes. A. A first-run theatre, in my opinion, is any theatre that plays pictures first-run in its individual community.

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Q. Plays anybody's picture first-run? A. Yes, I would say anybody's. I am talking about my own principally.

Q. Well, in this list that you gave us, then, you included theatres, did you, that played any product at all for the first time in the City? A. Played any product at all for the first time in the City, yes.

Q. All of the theatres in the cities named which played anybody's pictures at all for an initial exhibition in the town were included in the names you gave us of the first-run theatres in these towns? A. Oh, no. There are a lot of pictures that would never see the light of-day for first-run in a number of the first-run theatres. You know that.

Q. Yes. That is what I am trying to get at. That is, what the basis of the selection of these particular theatres that you did include in the list was. A. I believe those theatres want to play the best motion pictures they can get.

Q. Those are the theatres which played the best pictures on the first-run? A. Yes, sir.

Q. That was the basis for your selection, is that right? A. They are theatres which play the best pictures first-run, yes, and maybe some of the poor ones; I don't know.

Q. Well, the Little Theatre that you gave us there in Washington has not played a first-class major picture on

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first-run in ten years, has it? A. It has not played any of mine, I hope.

Q. Why did you put it in the list as a first-run theatre?

A. Because it is so considered. It plays some of the small pictures or some of the inconsequential pictures, I suppose, but it is listed as a first-run theatre and is so considered.

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Q. Listed by whom? Where? A. Well, our records in New York would indicate that it was considered a first-run.

Q. Well, were you just testifying from some records that you had in New York or from any personal knowledge that you have about the theatre situation there? A. I was testifying principally from the records that I had in New York plus the knowledge that I have gained over a period of a good many years.

Q. As a matter of fact, you did not include in the list a Warner Theatre, the Ambassador, which plays many first-class major pictures, and first-run, did you? A. I never considered the Ambassador to be a definite first-run theatre in Washington.

Q. Well, the Ambassador actually has, in the last five years anyway, played more, or has played a substantial number of first-class major pictures, and first-run, hasn't it, simultaneously with the downtown play dates in the Warner theatres? A. It has not played any of ours first-run.

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Q. Your list was not limited to the list which played your pictures first-run; that is right, isn't it? A. The list may not have been, but I was trying to establish the fact that we selected the first-run theatres where we thought we had the better opportunities for return—

Q. I understand that, but you went further than that, and you undertook to name the other first-run theatres in the town, whether they played your pictures or not; that is correct, isn't it? A. The other recognized first-run theatres, yes, sir.

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Q. I am just trying to find out why you excluded the Ambassador and included the Little in your statements? A. Don't the Ambassador play also some single pictures?

Q. I suppose they do. A. That is not a customary thing, however. I would not class a theatre that played first and second, when they could get an occasional picture, first-run.

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I don't consider that a first-run theatre. Certainly I would never seek that as a first-run outlet.

Q. Then you excluded from your tabulation those theatres which do not play first class pictures on first-run as a regular full-time policy, is that right? A. No, sir, I didn't exclude anything from that list. I listed the record that we maintain shows the recognized first-run theatres in all of these cities and the Ambassador is not a recognized first-run theatre in the City of Washington.

Q. What made the Little recognized first-run, according to your testimony? A. Because it has always been considered, and I suppose it plays such pictures as it can get first-run.

Q. It played constantly foreign pictures and three, and four and five-year old reissues? A. If I had a few foreign pictures and the possibilities were limited, sir—

Q. Can you just answer the question? A. I don't know what they play. I don't keep a record of their entertainments.

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Q. Without knowing what they play, you cannot give any accurate classification as to whether or not it is an accepted first-run theatre in the trade, can you? A. Wouldn't you believe, or haven't I got a right to believe that our representatives in the field know what is a first-run theatre and what is not?

Q. I assume your representatives in the field might know.

Judge Bright: How do you get the reports?

The Witness: They are all sent to us by our branch offices in the field. Most of our representatives have been stationed in the individual area over many years.

Q. I have understood you were testifying here about something you knew. I suppose if your representatives in the field want to testify, they are available, isn't that right? A.

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If I don't know fairly well, I have been fooling somebody for a long time.

Q. There are a very substantial number of theatres on that list that you gave us which you know as a fact never have or don't now play any regular run, regular first-run of first class pictures in those towns, is that right? A. Mr. Wright, what do you refer to as first class pictures? I consider every one of the theatres that are listed on there as being first-run theatres. Now, what they play, I have no (797)

knowledge of because I couldn't attempt to keep such a record. I only know of their record as first-run theatres.

Q. In other words, you are just giving us what your records in the exchange show, is that right? A. Plus my knowledge, yes. I possibly don't know every little theatre all over the country.

Q. You don't know anything about what the actual playing policy of the Little in Washington is, is that right? A. No, sir, I couldn't tell you that.

Q. Do you know anything about what the playing policy of the Little Theatre in Baltimore is, that you gave us as a first-run theatre? A. No, sir, I don't know what they play.

Q. You answer the same as to the Mayfair in Baltimore?

A. Would be the same. I don't know. It would be the same as it relates to any first-run theatre in Baltimore. I don't keep track of their entertainment.

Q. And this Downtown Theatre in Detroit, you know as a matter of fact that theatre has never had a run of first-run pictures there, is that right? A. Not for some time. Been closed. Been closed for most of the time—for a number of years.

Q. Why did you put that on the list? A. Because I had a letter from Mr. Balaban inquiring for our first-run the other day, and said he had taken the theatre over and a (798)

brother of one of the officials of the firm wants first-run there.

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Q. You put it down as a first-run prospect? A. Not a prospect for me. It is a first-run theatre now.

Q. You mean when somebody takes it over and says that he wants first-run, then it becomes a first-run theatre? A. I believe he notified me it had been so established and that he was seeking first-run.

Q. That State Theatre you named in Hartford, Connecticut, what first-run pictures did that theatre ever play? A. I believe some years ago it played some of ours. Did not do so well.

Q. How long ago? A. A good many years ago.

Q. Why was it put on the list as a first-run theatre now? A. Because I believe it is. So it has been reported to me as a first-run theatre. It has had a varied career.

Q. You haven't any idea as to what, if any, first-run product it has had? A. No, I haven't checked into it.

Q. You gave us two theatres in Louisville there, Mary Anderson and the National. A. Yes.

Q. Do you know anything about the playing policies of those theatres? A. I don't know what product they play, no.

Q. You know as a matter of fact that they don't have any regular first-run of any major product, is that right? (799)

A. No, I don't know that is a fact.

Q. Your knowledge is completely negative on the subject? A. On that, indeed it is.

Q. And in Philadelphia you gave us the Studio as a first-run theatre. Do you know what they play? A. No, I don't.

Q. And the Erlanger, I believe you already testified, was another closed theatre you gave us. A. Closed for a good many years, but I believe is open now. I don't know; I have heard it was.

Q. You gave us the World at St. Paul. Do you know what product, if any, that plays? A. No, I have been told that it plays foreign pictures and reissues and so forth, but

William F. Rodgers—By Defendant—Cross

I personally haven't any knowledge of what they play regularly.

Q. A theatre that plays foreign pictures and reissues is not what you would term a regular first-run theatre, is that right? A. I wouldn't sell it unless I had that particular type of product to sell. It is first-run to somebody.

Q. In that tabulation you gave us yesterday as to this number of theatres that lifted their admission price on this "As Thousands Cheer," I believe there were 300-odd out of 3000? A. I believe that was the record, yes.

Q. Did you make any check to see which of those were (800)

first-run theatres? A. I couldn't tell you that, no. I simply asked to have a statement made up that would show me the number of theatres that increased their admission price beyond the price provided for in the agreement. I did not attempt to differentiate between first, second and third.

Q. As a matter of fact, all those were first-runs, were they not? A. I don't know. I merely asked for the numerals. I haven't asked for the details.

Q. The other data is readily available, if you wanted to get it? A. Oh, the data is available, yes.

Q. On this question of what a satisfactory first-run outlet is, that is never solely determined by a consideration of the size or physical characteristics of the theatre, is it? A. Of the size? Not necessarily, no.

Q. That is, you have many situations where you may have a small theatre and if you can get sufficient playing time in it, you can make more money than you would ever get in a big theatre with less playing time, isn't that right? A. There may be such situations. A lot of things depend on it, however.

Q. There are other situations where, because of a low operating expense, a theatre may be able to pay you much more in first-run revenue than another theatre which, perhaps, has a floussier set of ushers, more expensive equipment

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and a fancier marquee, isn't that right? A. The additional (801)

expenses don't usually come from those reasons. It is many other reasons.

Q. I understand that, but it may be worth more to you than a high expense theatre which has a much finer appearance? A. Might be. There may be some situations.

Judge Bright: Isn't your take figured on the gross?

The Witness: My take is figured on the gross.

Judge Bright: What has expense got to do with it?

The Witness: The expense has got this much to do with it. Very often, if you are dealing with a theatre that has an unusually high expense, possibly an over-financed theatre, where the rent is high and their equipment is very expensive, and a charge-off, they are hardly in a position to pay you market terms and they want to buy pictures, because of their condition, at less than market terms because they cannot afford to pay the customary terms because of their high operating expense. So, as Mr. Wright pointed out, there are some theatres—we own a very small theatre in Toledo, Ohio, where our operating expense is not too high—but I can do better with our own theatre, as I tried to explain yesterday, than I could do with the Paramount Theatre in Toledo, which has an unusually expensive operation and seats many

(802)

more people. I would rather do business with our own theatre in that case, where I would eventually do much better in the net result.

Judge Bright: You mean you could make a better deal with the lower-priced theatre than the higher expense theatre?

The Witness: Very true, over-financed and over-expensive theatre. I might be able to do just as well with something not too expensive.

William F. Rodgers—By Defendant—Cross

By Judge Bright:

Q. Who determines what percentage you will get from any particular theatre? A. Well, we usually have a general policy. For instance, as I explained yesterday, we have a sliding scale. If I have a sliding scale that develops as the gross develops, for me to get an increased amount of revenue, a normally-operated theatre would have that scale developed in the proper order, whereas a fellow who has a very expensive theatre will object to the jumps of one percentage to another. He says, "You should leave a wider gap between 27½ and 30 per cent, or 30 per cent and 32 per cent," and in a theatre such as we operate in Toledo, as I say, it has been a very lucrative outlet for our product.

Judge Hand: All you mean is, really, there are situations where the exhibitor is in such difficulty, financially or otherwise, that he cannot and won't

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make the conventional trade with you?

The Witness: There are—

Judge Hand: And therefore you might do better with another exhibitor, yourself in your own theatre, or some other exhibitor who hadn't the apparent potentialities?

The Witness: That is correct, sir.

By Mr. Wright:

Q. And I suppose it is true that even where the same percentage terms are granted, you may get more out of the small theatre, if you play the picture there for a longer period of time, is that right? A. That, of course, would have to be specific, Mr. Wright. I couldn't answer that in a general way. I would have to know. Do you have any particular place in mind. I certainly couldn't hope to get as much money out of ten weeks at the Little Studio Theatre in Philadelphia as I could get out of the Stanley in two.

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Q. But if you have a 1000-seat theatre and a 2000-seat theatre, you can get much more out of three weeks in the 1000-seat theatre than you can get out of one week in the 2000-seat theatre, isn't that right? A. You would have to talk——

Q. Same admission prices and same terms? A. You would have to talk to me specifically on that. I couldn't answer that.

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Q. That is a possibility? A. Could be a possibility. I couldn't say it was or it was not until I knew what you were talking about or where you were talking about.

Q. In any event, playing time is a function of your profit possibilities? That is one thing that determines how much revenue you can take out of any first-run theatre, is how much playing time your pictures get, isn't that right? A. Playing time is the most competitive thing in this business today.

Q. But can you answer the question? A. Playing time is very important to us, very necessary, to get the best we can.

Q. The answer to my question is yes, isn't it? A. Well, I would have to ask you to read the question again.

Q. (Read.) A. That is one thing, yes, sir.

Q. And how much playing time is available to you in first-run theatres depends, of course, does it not, on what other product the theatre has available, right? A. I don't know whether it depends on what other product it has available or not. I know that when we have a product to lease we want it played in certain theatres, I would rather feel that the other product that is leased at that theatre depends entirely on what they have left after they play ours.

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Mr. Davis: Will you raise your voice a little? We cannot hear you very well.

William F. Rodgers—By Defendant—Cross

Q. I understand that is the arrangement you prefer but, as a matter of fact, how much playing time you line up with depends, at least to some extent, on what other comparable pictures are available to the exhibitor, isn't that right? A. Not necessarily the case. In the majority of places where we operate, and the types of theatres that I assume you are talking about, we have what are commonly known in this business, as you know, as hold-over figures. In other words, our picture can play at the Radio City Music Hall as long as the first four days reach a certain amount of money. The same holds true with our Capitol Theatre. So we won't go into a theatre of that type, in a good many other first-run theatres, for a given period of time. It depends on the public's support of the picture.

Q. Can you tell the Court just how you use this sliding scale formula of yours, that is, when you make a deal with an exhibitor, as I understand it, you have an option there, he can either buy on a flat rental—that is, in the exceptional case, a fact? A. Very small cases—small theatres.

Q. And the other alternative is that he can give you a minimum guarantee against a fixed percentage of the gross? A. No, I don't particularly care about the guarantee against (806)

the fixed percentage, but in some small situations, where it may work a hardship on the theatre to pay our terms in the way of percentagewise; we have agreed to take a flat amount of money, \$50, we will say for illustration, and divide all the excess receipts beyond an agreed amount.

Q. And those are situations where you fill in on your columns—in those situations you fill in, in column 3 on your form there, a flat figure, which is a guarantee against a percentage of the rental, is that right? A. Well, I don't have many guarantees, Mr. Wright, against a percentage, no, sir. I have a guarantee rental with an excess receipts arrangement, but I don't have many guarantees against a fixed percentage.

William F. Rodgers—By Defendant—Cross

Q. I am afraid I don't understand the difference. You have a guarantee and then you have a certain overage, which is dependent upon what the picture grosses, is that right?

A. Yes.

Q. And that overage is determined on this sliding scale of percentages, that is, it always slides up with the increase in receipts, does it not? A. That is a different type of deal entirely than the sliding scale. The sliding scale is predicated upon a figure that is agreed to by which we get a given percentage and before we can earn a larger percentage, the gross receipts must go up, and we agree with the theatre (807)

owner the different grosses that must be reached before our percentage can increase.

Q. Yes, I understand that, but you have on your column here headed "Sliding Scale Terms" spaces headed "When gross receipts per unit of playing time equal or exceed a certain amount." What is that figure that you inserted in there as a figure per unit of playing time? How did you arrive at that? A. A unit of playing time is this, that generally speaking in situations in this country, where theatres are open seven days; there are ten units charged, the assumption being that three units of the ten represents about the amount of business that a man does on Sundays, two units represents what he does on Saturdays, and one unit for each of the other five days of the week. So, therefore, when a unit figure is arrived at, it is set in that column—

Q. And that unit figure is a flat amount in dollars? A. That is true, and we get a certain percentage up to that figure and then beyond that it improves as the scale provides.

Q. How do you determine that unit figure? A. By negotiation.

Q. And that negotiation involves a consideration of what factors? A. Well, it involves, usually a factor—that is de-

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terminated by the gross receipts, that we have a record of, that the theatre is doing with our pictures; and in other cases, where we have authenticated the operating expenses of the theatre, we have no hesitancy in making a deal based on the man's cost of operation.

Q. So that your unit or control figure there is closely related to his expense of operation? A. In some instances; in others, no. Some people won't let us audit expense, they won't tell us what the expense is.

Q. Your contract gives you the right not only to audit the gross receipts but to go in and audit his expenses, if his agreement with you is such that his film rental is computed in terms of profit as well as mere gross, isn't that right? A. Any contract that has anything to do with expense, we reserve the right to verify it, yes, sir.

Q. In negotiating in the past these percentage deals for a sharing of proceeds, after the gross reached a fixed amount, you always fixed that so-called split or control figure with reference to what the operating expenses of the house were, isn't that right? A. Very often what he told us they were.

Q. In any event, you did not expect to share 50-50 with him until he had at least gotten his expenses back and some, or usually some profit, isn't that right? A. That is true, but they aren't subject to audit. That is not subject to audit.

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Q. I suppose that depends on the terms of the agreement?

A. Exactly.

Q. You spoke of this competition between these affiliated theatres in these towns you named. You did not mean to suggest by that that there was any competition between them in so far as licensing of your films was concerned, did you?

A. No, no, I wouldn't suggest that.

Q. And I take it you don't know enough about their operating policies, or such other films as they license, to have any very accurate idea as to the extent to which they might com-

William F. Rodgers—By Defendant—Cross

pete with each other otherwise? A. No, I only know that every one of the theatres that we operate are operated in cities where there is keen competition, but I do not keep a record of what the other theatres play, nor do I know what they lease.

Q. You only know that there are other first-run theatres there? A. Yes.

Q. That is what it comes down to? A. That I know.

Judge Goddard: Mr. Wright, just what do you mean by "affiliated theatres"?

Q. I take it in response to the last question you understood the term affiliated as referring to those affiliated with one of the defendant distributors here, is that right? A. I understood it as that, yes.

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Q. In this question of selecting these so-called move-over or continuous first-run outlets, many of those theatres are of the character we were discussing where they are rather small and have a low operating overhead, isn't that true? A. No, not necessarily. Some of them are, but that is not the rule by any means.

Q. In those situations where you license your first-runs, that you described in your direct testimony, to these first-run theatres in the 92 cities where there were two or more of them, your films were generally licensed on what you call an "or" basis, is that right? A. That is true.

Mr. Devis: On what basis, Mr. Wright?

Mr. Wright: "Or".

Q. That is, you license them for such and such a theatre or the next one or the next one, so the exhibitor may play the film in any one or all three or four, as the case may be, is that right? A. We usually don't incorporate "or" unless the theatres are more or less comparable.

William F. Rodgers—By Defendant—Cross

Q. In most of those situations you regard them as comparable for your first-run purposes? A. That is usually a negotiation. We are selling now by group, as to the manner in which our pictures will be played and what theatres they will be played in. I could cite you any case that you could ask me about in most any of the important cities, but I would (811)

not give a "or" to be played in any theatre they wanted to. Some of them are too small to give the proper presentation, first-run, or first showing, to one of our more important pictures.

Q. That Columbia Theatre that you used regularly as a move-over out in Washington for your pictures, that is a small and not particularly prepossessing theatre, isn't it? A. Yes.

Q. When you compare it to the other first-run houses?

A. Very great grossing possibilities. Doesn't cost so much as the Capitol.

Q. I understand that, and that is the kind of theatre I was referring to, small in size, and with low operating expenses and does not compare in appearance or appointments and front with your other houses. A. Yes.

Judge Bright: Is the dollar value to you the determining factor in your definition of a first-run theatre?

The Witness: It is a very important one, one of the most important. However, it is not the final, but it is most important. There are sometimes when people have offered us unusual terms hoping we would give the pictures and sometimes they might not be financially able to carry on, and it was just done with the thought of taking pictures away from an estab-

(812)

lished customer, hoping that you would be selfish

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enough to pick it up, but generally speaking the determining factor, and the largest contributing factor, is the amount of revenue we can earn as film rental.

Q. In your list of these first-run theatres, you did not mean to suggest, did you, that there were no other theatres than those that you named on the list which might have been suitable for the so-called move-overs or continued first-runs? A. No, I did not list those at all.

Q. For example, in Providence, I think you testified that you moved over pictures into a theatre that Mr. Fay has there? A. One of them, yes. He did. I haven't looked at the records lately.

Q. I believe you testified you also had an interest in that theatre? A. Some sort of an interest, our theatre department has. I don't know the extent of it.

Q. That is an interest in the operating profits of the theatre? A. Yes, and I guess the losses.

Q. Yes. A. Yes.

Q. And those profits and losses would be the profits and losses on all the pictures that that theatre played in addition to just those of yours? A. I should assume so. I am not in a position to testify on that, though, because I don't know.

Q. That is, these move-over houses, in which you say you (813)

had an interest in these various situations, do not play your pictures exclusively, they also play pictures of other distributors? A. Yes.

Judge Bright: Mr. Wright, in your use of the words "affiliated theatre" do you mean other than theatres in which the particular defendant has a stock interest, or is it broader than that?

Mr. Wright: No. As the witness and I have been using it, as I understand his testimony here, it in-

Colloquy

cludes those theatres in which one or more of these defendants has some kind of direct or indirect stock interest, actual interest in the profits of the house.

Judge Bright: Stock interest—any interest?

Mr. Wright: Yes, whether the interest—of course, in some cases it might be held by virtue of a pooling or operating agreement where the defendant receives a share of the operating profits by virtue of such an agreement without actually owning stock. In either case, I think we would both agree that those theatres would be classified as affiliated with the defendant in question.

Judge Bright: Is that the sense in which you have used it?

The Witness: I tried yesterday in my testimony to refer to them as associated with one of the defendants because I am in no position to know what financial

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interest they have in any other theatres; but I consider them associated with one of the defendants when it is necessary for me to deal with them in order to secure representation.

Judge Bright: Is it necessary for you to deal with the defendant?

The Witness: Yes, representative of the defendant.

Judge Bright: Of the exhibitor?

The Witness: Yes. As I illustrated here, in New Orleans between the United Theatres and the Theatres Service, whether Paramount has or hasn't any interest in those theatres, I am in no position to know, but I know if I want representation in them I have got to deal with the man who represents the Paramount Company and in those offices, so I consider them associated with Paramount. Whether they are affiliated through stock interest or not, I have no knowledge.

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Q. Getting back to this Providence situation, that theatre of Mr. Fay's, prior to the time you had acquired an interest in it, was not used by you as a move-over for your first-runs in Providence, was it? A. No, sir.

Q. And it is only since you acquired the interest in the theatre that your pictures have been made available to that theatre on a move-over basis? A. That is true.

Q. And the same thing is true, is it not, with respect to these similar situations you described, I believe, in Richmond (815)

and Norfolk, where you move over some pictures into some theatres that Fabian operates? A. I don't know that they move over as much as the product is, in some fashion, divided. We try to supply the pictures in any one of the theatres where we think the best results will be had.

Q. The product there is played in those theatres under a sort of pooling arrangement, isn't that right? A. I believe it is. I don't know the financial structure. I don't know the details other than we have interests there. Whether it is pooling or what it is, I don't know.

Q. You know you have a share—— A. We have an interest of some——

Q. —in the profits? A. —description.

Q. And that Rhodes Theatre in Atlanta, I think you testified that you operated it, the interrogatory answer says that Lucas & Jenkins operated it; I think Mr. Thompson said here in court it was operated by officers of Lucas & Jenkins. Do you know just what the relationship between your company and the Rhodes is? A. Well, if I testified yesterday that we operated it, I did so in error. I know we are interested in it and I don't believe that we have anything to do with the operation. I think that Lucas & Jenkins operates the theatre. I don't think we have anything to do in the operation.

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(816)

Q. You share in the profits? A. Oh, yes, we have an interest in the theatre, definitely.

Q. And that share in the profits that you have, through operating agreement, includes, of course, such profits as are derived from the exhibition of films other than yours there?

A. I should assume so.

Q. That is not limited to those pictures that you move over? A. Naturally.

Q. As in the case of the Providence theatre, it was not given the privilege of showing your films on a continued first-run until after you acquired an interest in the theatre? A. Never had any carry-over until after we acquired an interest, that is right.

Q. The same thing is true with respect to the Brown Theatre in Louisville, which you referred to? A. We have some sort of interest there too.

Q. An interest in the profits again? A. Profits or operation—I don't know—profit and loss—I don't know what it discloses.

Q. In many of those situations that you covered in your direct testimony, where you now sell certain theatres on first-run, you did not sell them when they were in independent hands, did you? Do you recall any of those instances?

A. You would have to recite a specific instance. I couldn't deal generally with it. Sometimes we did, yes; other times,

(817)

possibly, no. I don't know.

Q. Let us take the Minnesota Theatre up there in Minneapolis. Do you recall that? That is now named, I think, on your list as the Radio City Theatre. A. Yes.

Q. Changed the name? A. Yes.

Q. Originally built there by Paramount as a very large, de luxe first-run house? A. Yes.

Q. And then you recall that Paramount gave it up and it passed into the hands of bondholders? A. Yes.

William F. Rodgers—By Defendant—Cross

Q. That was after the 1936-37 season and following the 1936-37 season it was one of your first-run outlets there?

A. Yes, it was operating for a while first-run.

Q. And then after the bondholders took it over it was never offered any pictures by you for first-run exhibition, was it, during that period? A. No, because we never thought it was justified. As a matter of fact, I was never very happy with it when Paramount had it and very often refused to play pictures there. It was a bad location, high overhead, and while it was operated by bondholders, the business was very poor there.

Q. Then again, when Paramount took it back, however, and renamed it the Radio City, since that time your pictures have been playing there first-run? A. The business is very good in Minneapolis now, yes, sir—in that theatre, unusually good.

(818)

Q. And substantially the same thing occurred with respect to the Oriental Theatre in Chicago? A. Oriental Theatre in Chicago?

Q. Yes. A. With the possible exception of "Gone With The Wind," I don't remember ever dealing with the Oriental first-run in Chicago—for many years—at least not since I have had anything to do with it.

Q. And the Oriental, prior to that, and while it was being operated first by Balaban & Katz back there in, let us say, the 1936-37 season, was licensed for first-runs of your pictures along with the other Balaban & Katz Loop houses, wasn't it? A. I don't think Balaban & Katz were operating that theatre in 1936, as far as I can recall.

Q. When they last did operate it, before the bondholders took it over, it was licensed by you for first-run along with other B. & K. Loop houses? A. I don't recall that because I did not occupy my present position prior to 1936, and I didn't have anything to do with Chicago prior to that time.

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Q. You know the Oriental Theatre? A. Very well—oh, very well.

Q. That was the newest, next to the largest and probably the best located of all the first-run theatres in the town, isn't that right? A. It is a very fine theatre.

(819)

Q. You say you did license *Gone With The Wind* there?

A. As to one or two theatres, yes, we licensed.

Q. You licensed on a day and date in the Oriental and the Wood's? A. That is right.

Q. That is a term that means you—that is a term that you use that means simultaneous showing first-run? A. That is simultaneous showing. It is different than equal availability.

Q. You did not offer it then until after you had been unable to agree with Balaban & Katz on terms for the picture, isn't that right? A. That is correct.

Q. That was the only reason that it was made available to the Wood's and the Oriental? A. That is true.

Q. And it did have a very long run at the rather small Wood's, did it not? A. Very long run.

Q. Paid you a very handsome— A. Long run in both of them.

Q. Paid you a very handsome film rental? A. Very substantial.

Q. Are you familiar with the Main Street Theatre in Kansas City? A. No, not that I know of, not for years.

Q. Used to be operated first-run there as part of the Paramount, when the Paramount-RKO-Fox pool was functioning there, is that right? A. Yes, but I don't believe

(820)

that theatre compares in any way at all with the Midland Theatre.

Q. Regardless of how it compares with the Midland, it was operated as a first-run theatre by the Fox-Paramount.

William F. Rodgers—By Defendant—Cross

RKO pool at the time the first-run theatres other than yours were pooled out there? A. I don't recall that. That was also, I am sure, before I had charge of Kansas City.

Q. Then when the pool dropped it and Mr. Shineberg got hold of it, do you recall that efforts were made to negotiate with your company for films for it? A. Never since I have been in my present position do I ever recall having anyone try to lease pictures for it first-run in Kansas City.

Q. In no event did you offer any films to the Main Street, and it is now, you say, closed and it has been closed for some years? A. I wouldn't offer any pictures. Our own theatre requires them.

Q. The theatre is now closed; you understand that it has been closed for some time? A. That I don't know off-hand, no.

Q. There is a theatre in Omaha called the Town Theatre run by Mr. Goldberg out there, which is perfectly suitable, physically, for move-over or continued first-runs, isn't it? A. I don't know that it would. We recently made a deal with Mr. Goldberg for the use of our pictures in one of his other (821)

theatres down there and he isn't doing so well.

Q. My question is with reference to the Town. A. I don't know that it would be desirable. Omaha is rather limited in its possibilities.

Q. In any event, you have never offered any pictures to the Town for move-over or continued first-run? A. I doubt very much if I would approve it if it was even suggested.

Q. Then this policy you have adopted of only putting move-over runs in the theatres in which you have an interest, have you followed that same policy in dealing with theatres of the other defendants?

William F. Rodgers—By Defendant—Cross

Mr. Davis: Excuse me a moment. It may be because I did not hear something that passed, but I don't remember that statement by the witness.

Mr. Wright: Perhaps I misunderstood the witness.

Q. I understood you did have the policy, in so far as move-overs of your pictures from your own first-run theatres were concerned, not to move them over to another theatre unless you had an interest in that theatre or an operating profit interest, is that right? A. I did not say that we had a policy in that direction.

Q. That has been the practice? A. I will tell you very frankly, I would not do it. If I was requested for a move-
(822)

over, if we did not have an interest in the theatre, I would not grant it.

Q. And it has been your practice to grant them only where you do have— A. Wherever our company owns it or operates it or has an interest, that is a different thing.

Q. That same practice has been extended, has it not, to theatres in which the other defendants are interested with respect to the showing of your pictures? A. To my knowledge we have not granted any move-over rights to anyone unless they were interested with the first-run there, yes.

Q. Specifically in Philadelphia, back several years ago, your pictures used to move over, or sometimes have the initial exhibition, in the Keith and the Carlton Theatres there, isn't that right? A. A few of them did, yes.

Q. And then do you recall when it was that Warner lost those theatres and Mr. Goldman took them over? A. A couple of years ago, I believe.

Q. And after Warner lost its interest in them and Mr. Goldman took them over, then you did not make your pictures available for a move-over run at those theatres, did you? A. We never had a steady move-over with either one of the theatres.

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(823)

Q. Can you just answer the question?

The Witness: Read the question.

Q. (Read.) A. No.

Mr. Davis: I submit he has answered and the answer is responsive.

Q. And you in fact inserted a 14-day clearance between the Warner first-runs and the runs of your films in the Keith and Carlton, is that right? A. No, sir.

Q. You did not? A. No, sir.

Q. You did not license your films to him at all? A. Oh, yes.

Q. For the Keith and Carlton? A. Yes.

Q. On what terms? A. 7 days after.

Q. The clearance interval was 7 days? A. That is true.

Q. And your license agreements required him to charge the same admission price as Warner did for the first-run?

A. No, he offered that. They were his admission prices. We did not require them.

Q. The admission prices that went in the contracts that you made with him, stipulated as minimum prices, were the same that Warner was getting for the first-run, is that right?

A. They were his minimum prices, yes, sir.

Q. Then you sold a run to Warner immediately behind him at a 10-cent lower price, isn't that right, 10-cent lower admission price? A. Must have been at least 7 or 14. I don't

(824)

know what their admission prices are.

Q. Perhaps more than that. Perhaps a 20-cent differential. A. How much differential?

Q. In any event, you sold Warner a run immediately following Goldman with no clearance interval, is that right? No question about that? A. I could not say that to be a fact. There was no change in the runs between the first-run in Philadelphia, the Keith and Carlton, and the following runs.

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in Warner's. There was no change, generally speaking, in those runs after Goldman took those theatres.

Q. Can you answer this question yes or no? Did you or did you not make pictures available for Warner Downtown Theatre immediately following the conclusion of the Goldman run in the Keith or Carlton? A. We made it available following. Whether it was immediately or not, I am not prepared to say.

Q. That you don't know. And you know also, do you not, that the admission price that Warner's was required to charge for the following run was very substantially lower than what Goldman was required to charge for the preceding run? A. I cannot help but not answer the question the way you propound it. We did not require anybody to charge any particular admission price, Warner's or Goldman.

Q. I take it your contract does? You do not have any (825)

doubt about it? A. It is not what I require of them. It is their prevailing admission prices.

Q. You do know that the admission price that was incorporated as a minimum in your contract for the Warner following run was substantially less than the price at which— A. No:

Q.—it was incorporated in the Goldman contract? A. I don't know that it was substantially less. I am willing to assume it was less but I am not willing to say it was substantially less because I don't believe it was.

Q. As far as immediately following over, a picture goes from one house to another without clearance, there isn't any practice or policy that you have that requires any common interest in those circumstances in the two houses? A. For moving over pictures? We haven't granted any. We haven't granted any.

Q. I did not say for moving over pictures. I said, with reference to licensing immediately succeeding runs, you do

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not have any practice or policy that requires the holder of the immediately preceding run to have an interest in the operation of the immediately succeeding run; that is correct, isn't it? A. No, we have no such policy.

Q. Of course, you have many runs here and in Chicago where they follow immediately with no clearance and they are opposition theatres, there is no unity of interest at all? (826)

A. I don't know that they follow immediately but they follow each other. I don't know whether they have interests or not. It depends on the way they are booked.

Q. You don't care? A. I am not interested.

Q. I think you said something in your direct testimony about staying with this Adams Theatre in Paterson, New Jersey, to the extent of one-third of your pictures and—

A. That is right.

Q. —you said you had originally sold that account as the result of some difference of opinion between you and the Warner Circuit back there in the early '30s? A. Yes.

Q. And at that time you were out of the whole circuit, is that right? A. Yes.

Q. Philadelphia as well? A. That is true.

Q. You were then playing pictures in Philadelphia in the Chestnut Theatre Opera House? A. One of the Chestnut Theatres, yes.

Q. And then you said the succeeding season you and Warner resolved your differences of opinion and you were back in the circuit? A. Yes.

Q. Is that right? A. I don't know whether it was the succeeding season. I think it was the same season we straightened out our differences.

Q. You mean you had not played off the full season before (827)

you got together? A. That is correct.

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Q. But in any event, such pictures that had been released while the break was on, Adams had played all of those, hadn't he? A. Adams had? As far as I can recall, yes.

Q. Then when you got back together with Warner's, you have allocated ever since one-third of the season's product to Adams and two-thirds to Warner's, is that right? A. I believe that is the division, one-third and two-thirds, yes.

Q. And you make that division—when you have these so-called splits—mechanically, how is it determined who gets which of the pictures in the split? A. It is usually arranged between the theatres. One time one theatre will make up a list and divide it in three and give it to the other fellow to select. Next time, the other man will make up a list of three and give it to the competing theatre to select.

Q. You call that one making the split and the other making the selection? A. That is right. That is the way it is usually divided.

Q. In this last exhibit that you offered, where you gave us this substantial list of towns, on the last page there, which are labeled Saenger Replacements and Theatre Service Replacements, those towns are all towns in which you (828)

formerly sold the so-called Saenger Circuit or the theatres for which Mr. E. V. Richards negotiated licenses? A. That is right.

Q. And Mr. Richards has been for many years one of the directors of Paramount? A. Yes, I believe he is—I don't know whether he is a director, but he has been over there for a great many years.

Q. And as to many of these theatres, as I understand it, you say you have no knowledge as to the extent to which the Paramount Pictures Corporation itself was interested; you only know that the situations are those in which Richards negotiated the licenses? A. That is correct.

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Q. And as a matter of fact, none of these independent theatres that are on that page there as having been sold in opposition to Paramount were offered any of those pictures until after you and Mr. Richards had been unable to agree to terms for his circuit, isn't that right? A. We wouldn't offer them to the theatres directly. Never dealt with the theatres direct, but these people we never offered, that is true, until after—

Q. Until— A. —we fell out with Richards.

Q. —you broke with Richards, and your break with Richards extended to the entire circuit for which he bought? A. That is true.

Q. Have you had any negotiations with Richards since (829)

about getting back together? A. No, sir.

Q. And Richards is also the operator of the first-run theatres there that are associated with Paramount, is that not right, New Orleans? A. I believe he is, yes.

Q. And at the time you had this break with him do you recall what, if any, suggestion was made as to whether or not you could get together if he operated the Loew Theatre there or permitted to operate your theatre? A. No such suggestion was ever made to me.

Q. You never discussed that with him? A. Never.

Q. I see you list on here as independent for Albany the Fabian Circuit, is that right? A. I consider it an independent, yes, sir.

Q. Fabian, of course, is actually an operating partner of yours in a number of situations, theatre operating partner?

A. Not there, he is not. He is in Richmond and Norfolk.

(830)

Q. And in Albany I see you have under the heading, "How long since?" "Always." As a matter of fact, for many years your first-run account was what was then called the RKO Warner pool, isn't that right? A. I can't recall

William F. Rodgers—By Defendant—Cross

whether we dealt with the RKO Warner pool; I don't think so. We had as an outlet Warner for a while in Albany, but for many years it has been Fabian.

Q. Well, you may have licensed the pictures, or negotiated with the representative of one company or the other, but you knew, did you not, that the first-run theatres there were pooled in a joint operation? A. That is possible, but it is so many years ago that I hesitate to express myself as to what was the pool, because I have been dealing with Fabian directly for many years.

Q. And you don't know what Fabian's relationships with the RKO theatres are there, do you? A. No, I don't know what his relationship is, except that I know that they have nothing to do with the buying of pictures there; nothing whatever.

Q. The buying of your pictures? A. That is right.

Q. Now, apart from this sell-away from the Richards circuit that is indicated on the last page or on the last two pages of your last exhibit here, which occurred, I believe—in 1942 or 1943? A. About three years since we have been dealing with him.

(831)

Q. Apart from that, can you point to any one of these situations on this chart where you took or where you transferred a product from an affiliated operator to an independent? A. Of course, I don't have the chart in front of me, but offhand I happened to think of Atlantic City.

Q. Look at it (handing). A. Thank you. I happened to think of Atlantic City, where a good many years ago we used to sell Warner pictures there and we took them away and sold them to the other people down there.

Q. That was at the same time that you were out of the Warner circuit in Philadelphia and in Paterson, isn't that right? That is, you were unable to make a deal with Warner— A. We used to divide our product; we used to

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give Warner some and give the independent some; and at the time we had our differences, we gave the independent all and never took it away from him.

Q. And he has managed to keep all? A. Yes. And I recall—I don't know whether it is here or not; I guess it is somewhere—in Camden, New Jersey, we used to sell Warner all of our product there, and some of it goes now to the Savar Theatre, I believe.

Q. That occurred at the same time, did it? A. No, I don't think the Savar Theatre at that time was built in Camden. In fact, I am sure it was not.

Q. Well, when did that happen? A. Oh, that must have (832) been twelve, fifteen years ago.

Q. I do not see that in your list. A. I certainly overlooked something there. I don't see Camden either.

Q. Well, my question was confined to what you have got on your list? A. Yes. We took product away from the Paramount organization in New Bedford, Massachusetts. We used to supply all of our product to Paramount there.

Q. I don't see that on the list either. A. Oh, yes. That is divided.

Q. Where is it? A. On the first page, opposite Boston. We used to do business with Paramount completely in Portland, Maine, and took our product away from them and gave it—

Q. Now, wait a minute. This Boston situation, you are talking about a split there, aren't you? A. Yes, Paramount used to have it all.

Q. And then you gave half to Harry Zeitz? A. Harry Zeitz, yes, sir.

Q. Any others? A. Yes. We just finished taking some away from Paramount in Taunton, Massachusetts.

Q. I am talking again about the list here. Now you say in Portland you also gave half to another independent?

William F. Rodgers—By Defendant—Cross

A. Yes. We took half of it away from Paramount and gave it to an independent. And in Taunton—

Q. What were you going to say about Taunton? A. I (833)

say we just completed arrangements to take part of it away from Paramount in Taunton, Mass., and give it to an independent.

Q. That was pursuant to the settlement of a suit brought against you for treble damages and an injunction under the Sherman Act was it not? A. Not so far as my company was concerned. We had agreed to do it several months ago before any suit was filed or threatened to be filed.

Q. Well, in any event, he did not get any of your pictures until that suit was dismissed and settled, isn't that right?

A. Well, if he did not, it was his own fault. He has had a contract for some of our pictures for months.

Q. Just answer the question. A. Well, he could have. He had a contract for them. Now, we took pictures away from Warner Bros. on this particular list in Olean, New York, I believe, and gave it to an independent there.

Q. Olean, New York? What is that under? A. That is on the first page. That is opposite Buffalo.

Q. When was that, you say, twenty years ago? A. I don't know how many years ago, but a good many.

Q. Well, it says twenty here. A. That was not twenty years ago. It could not have been twenty years ago. It was during the—I should say twelve or fifteen years ago.

(834)

Q. You think this is an error here? A. I know it is.

Q. That is during the same season when you were out of the Warner circuit generally, is that right? A. That is true.

Q. Any others? A. We must have taken away from Warner in Chillicothe, Ohio.

Q. Chillicothe? That is opposite Cleveland? A. Cincinnati.

Q. That was half, was it not? A. Yes, sir.

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Q. That again was one of those situations where you sold the entire product to Meyers, while you were having this difference of opinion with Warner, and then when you got back together he kept half? A. That is right, but we had previously sold it to Warners.

Q. Before you had the difference of opinion? A. Yes.

Q. Any others? A. Well, we took product away from Warners in Bayonne, New Jersey.

Q. That was at the same time when you were out of the circuit? A. Yes.

Q. That is, when you went back to Warner you left half with the independent and gave half to Warner? A. Well, not immediately. The major part of it, if not all, with the independent for at least one year, and sometimes two; and then later we divided it between the independent and Warner; but we had originally taken it away from Warner. The (835)

same condition applies to a number of these other places that are listed here.

Q. Well, can you name them? A. Well, there is Lancaster, Pennsylvania. Warner had had it. In Shenandoah, Pennsylvania, we took half of our product from the Comerford-Publix interest.

Q. You just have prior to 1930-1931. Do you know when that happened? Have you any personal knowledge as to the circumstances there? A. I could not tell you offhand, no, sir.

Q. Any others there that you know about? A. Here is the Shea interest, and we divided our product there, one-third I think to Warners and two-thirds to Shea, as I recall. We used to do business with Warners completely there.

Q. That was prior to the time you had that break over the circuit? A. Yes. The same thing applied to Morgantown, West Virginia, New Kensington, Pennsylvania. I believe in Wheeling, West Virginia, there was a time when we dealt

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entirely with the Rex Theatre, with whom Paramount was associated, but we later divided the product there, I believe.

Q. You don't know the circumstances surrounding that, do you? -A: No, except that we decided to take half of it (836)

away from the Rex Theatre and give it to the Osborne interests.

Q. You do not know why? A. No, I can't tell you offhand why.

Q. Any others? A. They are all that I can recall at the minute.

Q. Now, wherever the situation is first-run or second-run, it has been so noted here. I take it this list means if there is no run designation, that means it is subsequent run, it is not first or second, is that right—you just have a dash on the run? A. Well, there is no run designated in the contract, I suppose. It can be first or second run, depending on the situation. It can be either construed as what it says or just with no particular runs considered.

Q. Mr. Rodgers, you also testified in the Schine case in Buffalo. Do you recall that, last fall? A. Yes.

Q. And you gave testimony similar to what you have given here about dealing individually with theatres? A. Yes.

Q. And you recall that you were asked whether you had written a letter to Mr. Dickinson about the Palace Theatre there at Lockport? A. I recall such an instance, yes.

Q. You testified to writing the letter? A. I think I testified that I did write such a letter.

Q. And I will read this paragraph and see if you recognize that as what you wrote:

(837)

"In our negotiations with the Schine interests it will very likely be that we will have to give them consideration for our product at Lockport as well as other situations, and as we are hardly in a position to fore-

William F. Rodgers—By Defendant—Cross

go or jeopardize the business from their other situations, and for the further reason that they have for a number of years been a very representative account, we feel that our interests will be best served by giving them such consideration."

That was part of the letter that you wrote? A. I believe, substantially, that was the letter. Was there any other testimony I gave in connection with that same letter?

Q. Yes. I believe you testified, did you not, that after Mr. Dickinson received the letter he came to see you and was somewhat abusive to you because you were not going to stay with him in Lockport; isn't that right? A. It was more or less—I think that I must have testified that we always considered him a very undependable man. There was justification. I think I attempted to justify the reason for writing the letter.

Q. Now, as to what you must have testified—

Mr. Wright: I move to strike that out. That is not responsive to any question I asked him.

Judge Hand: Motion granted.

Q. That Palace Theatre business was unquestionably the best theatre in Lockport, wasn't it? A. Structurally, yes.

Q. And it was one of those situations where you had sold him the first-run when you had a disagreement with the Schine circuit, is that right? A. That is true.

Q. And when you got together with the Schine circuit again, you took the pictures away from him with no further opportunity for negotiation; that is what happened, isn't it? A. That is correct.

Mr. Wright: That is all.

Judge Hand: We will adjourn until two-fifteen.

(Recess until 2:15 p.m.)

Record from D. C. U. S., Southern District of New York—
Continued

Defendants' Cases—Continued

Witnesses called by Paramount—Continued

Harry David

Testimony stipulated

1924-1927 (IV),

Sam Dembow, Jr.

Testimony stipulated

1928-1935 (IV)

Witnesses called by Fox—

Spyros P. Skouras

Testimony stipulated

1044-1051 (II-III)

